DOCUMENT RESUME

ED 240 652 CS 504 542

AUTHOR	Ewbank, Henry L., Ed.
TITLE	Free Speech Yearbook 1983. Volume 22.
INSTITUTION	Speech Communication Association, Annandale, Va. Commission on Freedom of Speech.
PUB DATE	84
NOTE	110p.
AVAILABLE FROM	Speech Communication Association, 5105 Backlick Rd., Suite E, Annandale, VA 22003 ($7.00).
PUB TYPE	Information Analyses (070) -- Legal/Legislative/Regulatory Materials (090) -- Reference Materials - Bibliographies (131)
EDRS PRICE	MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS	Bibliographies; Books; *Censorship; *Court Litigation; *Freedom of Speech; Government Employees; *Government Role; Legal Problems; Patriotism; Publications; Speech Communication
IDENTIFIERS	*First Amendment; Photojournalism; Supreme Court

ABSTRACT

A collection of nine articles, this yearbook focuses on freedom of speech and censorship. The topics covered include (1) judicial invention in First Amendment governmental regulation cases, (2) the impact of the Moral Majority on book censorship; (3) Justice William Brennan's championship of the First Amendment, (4) the legal tactics that public persons must currently use to obtain libel judgments that will hold up on appeal, (5) the protection and restriction of government employees' political expression within the context of current First Amendment theory, (6) Supreme Court decisions involving the First Amendment in 1982-1983, (7) the 1938 censorship of "Life" magazine's photo essay on the birth of a baby, and (8) the development of an instrument to assess patriotism in the United States. The final article is a freedom of speech bibliography of articles, books, letters, and court cases from July 1982 to June 1983. (MM)

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FREE SPEECH YEARBOOK 1983

a publication of
The Commission on Freedom of Speech
of the

Speech Communication Association

Volume 22

Editor: Henry L. Ewbank

University of Arizona
Tucson, Arizona

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The H. A. Wichelns Memorial Award for the most significant contribution to the Free Speech Yearbook was established in 1974 to honor Herbert Wichelns, a pioneer in the speech communication discipline and an early advocate of the importance of the speech-law aspects of speech communication.

1983 Award Recipient: Josina M. Makau, The Ohio State University

JUDICIAL INVENTION IN FIRST AMENDMENT GOVERNMENTAL REGULATION CASES

Josina M. Makau
The Ohio State University

Lloyd Bitzer writes that all "rhetoric is situational." According to Bitzer, rhetorical situations--or the contexts in which speakers or writers create rhetorical discourse--prescribe appropriate rhetorical responses.[1] This paper applies a situational perspective to judicial invention in First Admendment cases. In an effort to help broaden our understanding of this complex context, the paper sets forth the following three claims:

I. Appropriate responsiveness to the rhetorical constraints imposed on judicial invention in First Amendment cases is vital to the preservation of free speech;

II. These constraints are divided into two categories: general constraints applicable to all judicial invention and particular constraints specific to judicial invention in First Amendment governmental regulation cases.

III. And finally, actual judicial invention in at least two types of First Amendment cases falls short of the rhetorical demands imposed by this context, thereby threatening the preservation of free speech.

The paper is divided into three parts, each addressed to one of these three claims. Part One employes historical evidence to show that judicial satisfaction of the rhetorical demands imposed by the First Amendment context is important to the protection of free speech. Part Two characterizes the constraints which define the context in which Justices author First Amendment case opinions. And Part Three looks at the actual operation of judicial invention in two types of First Amendment case opinions to see how well Justices conform to the demands imposed by the constraints discussed in Part Two.

Part One: The Importance of Appropriate Judicial Invention

Political scientist Howard Ball writes that the judicial function "is the only defensive armor the Constitution has in the face of intentional or unintentional abuse of its concepts, powers, obligations, and responsibilities by other governmental actors."[2] This precept is particularly important to defenders of free speech; implicit in Ball's observation is recognition that the Supreme Court is the only American institution officially charged with the protection of First Amendment rights. The Court's authority, then, potentially serves as an important institutional bulwark against governmental encroachment of free speech.

Larry Berkson argues persuasively that societal perceptions of the Court directly affect the maintenance of this judicial authority. Berkson employs percepts from communication theory to show further that the Court's authority directly impacts on its efficacy.[3] History confirms Berkson's claims and shows that Justices have employed their primary tool--the judicial opinion--to shape societal perceptions of the Court and, hence, to improve the chances of judicial efficacy. As Berkson observes,

> the Court did not command a great deal of respect among many of the founding fathers. It had no cases to decide during the first three years of its existence, and a number of outstanding individuals, among them Patrick Henry and Alexander

Hamilton, declined appointments to the bench.[4]

Additionally, "Chief Justice John Jay and Justice John Rutledge left the Court for more attractive opportunities in state government."[5] Unarmed with either purse or sword to gain authority,[6] Justice John Marshall turned to judicial rhetoric. Through his famous opinion in Marbury v. Madison (1803), Marshall,

> offered a justification for the Court's supremacy in interpreting the Constitution. A few years later Marshall also claimed the right of judicial review over state acts, and during his tenure the Court overturned more than a dozen state statutes on constitutional grounds.[7]

Since then, Justices have consistently used the judicial opinion to maintain judicial authority. Charles Miller notes accordingly that "judicial opinions are the most permanent and public manifestation of the work of the courts. . . ."[8] These permanent and public manifestations of the Court's work are employed by the Court's friends and antagonists within a complex cultural, social and political context. Despite its remarkable authority today, for example, the Court remains vulnerable to audience perceptions. Philip Kurland notes,

> It was the weakened confidence in the Court that made possible the Fortas affair. It was the popular mistrust of the Supreme Court that allowed impeachment and removal of a Justice by methods other than those provided by the Constitution. . . .The Sword of Damocles hangs over the Court by the thin thread, today a gossamer thread, of public confidence in the integrity of the Judiciary.[9]

In sum, societal perceptions of the Court's performance impact on the Court's ability to maintain its authority. This judicial authority in turn provides the only official institutional protection against governmental encroachment of free speech interests. Judicial invention--the most permanent and public manifestation of the Court's work--holds the key to preservation of this potential bulwark against governmental arbitrariness. Appropriate judicial responsiveness to the audience's reasonable expectations potentially strengthens the Court's ability to define the "restraints" the First Amendment imposes and the "freedoms it guarantees."[10] At the same time, inappropriate judicial invention threatens to weaken the Court's ability to protect First Amendment rights. As such, the Court has a responsibility not only to the litigants in any given case, but to all the Court's "constituents," particularly those persons who depend upon the Court for protection against governmental arbitrariness. As Ball suggests, Justices have the responsibility to announce their "reasoned judgments" in "craftsmanlike" opinions. "We must expect no less of the Supreme Court justices; we can demand no more than that."[11]

The discussion to follow will help define the demands audiences reasonably impose upon judicial invention in First Amendment cases. This discussion will show that Justices face both general and particular constraints as they author First Amendment case opinions.

Part Two: Relevant Rhetorical Constraints

Judicial opinions are written for and received by two kinds of publics, professionals intimately connected with the law on a continuous basis and publics who have intermittent interest in Supreme Court decisions.[12] These two groups form the following eight groups of particular audiences: Supreme Court Justices, lower court justices, legal administrators, legislators, lawyers, legal scholars, participating litigants, and other educated members of the body politic. Each of these particular audiences addresses judicial argumentation with unique, often conflicting sets of interests, values, and beliefs. Despite these differences, however, the Court's eight audiences share several fundamental beliefs regarding the judicial function. These shared beliefs and concurrent expectations form a composite view which imposes general constraints on all judicial

invention.[13]

Perhaps the most fundamental expectation shared by the Court's eight diverse particular audiences is that judicial opinions will provide coherent guidelines for legal administrators. Without such coherence, judicial opinions could not, of course, be properly enforced.

Another fundamental belief shared by the Court's audiences is the view that Justices must rise "above pedestrian politics"; they must strive for impartiality. Berkson writes accordingly,

> Social science research clearly indicates that justices are expected to act in a manner different from congressmen and presidents. In his pioneering work entitled Federal Courts in the Political Process, Jack Peltason noted that judges are expected to withdraw from political activity, avoid direct criticism of public officials, not support controversial issues, appear indifferent to the outcome of interest group struggle,, use temporate language, and avoid bias. In short, a justice must place himself above pedestrian politics. If he does not, he violates the role expectations placed on him by society.[14]

Canon Three of the American Bar Association Code of Judicial Conduct captures a central component of this composite audience expectation: " A judge should perform the duties of his office impartially and diligently." One of the responsibilities entailed by this canon is the admonition that judges "should be unswayed by partisan interests, public candor or fear of criticism." According to the ABA Code, "A judge should disqualify himself in a proceeding in which his impartiality might be questioned."[15]

An equally important component of this expectation is the need to maintain perceived separations of power. The Court is expected to perform functions different from those of the legislative and executive branches of power. Unlike these two directly partisan branches, the Court is expected to "decide controversies by explanation, persuasion, and reasoned justification."[16] As we will see later, this expectation serves as a particularly important rhetorical constraint in First Amendment cases.

This expectation is joined by the expectation that the Court will act fairly and equitably. Ball sumarizes these fundamental expectations,

> Consistent with the ideal element of law, the public desires fairness, uniformity, and impartiality as well as stability: 'Law should be reasonably consistent and coherent and have as one of its prime characteristics a reasonable predictability.'[17]

In practice, these expectations are best realized by judicial adherence to doctrinal consistency, or precedent. Wasserstrom explains the role precedent plays in the audience's perception of judicial justification,

> When viewed as reasons, precedents by themselves constitute justifications that require confrontation before they may be sensibly disregarded or altered.[18]

Stephen Jones's study of the percentage and frequency of specific justification categories appearing in two related cases led him to conclude that stare decisis plays a less significant role in judicial justification than legal theory advocates. Though Jones's study would seem to contradict our claim that precedent plays a potentially important role in satisfying composite audience expectations, Jones's case study neither addresses what Cardozo refers to as "underlying principles" of cases nor discounts the important rhetorical value of stare decisis. Further, Jones's limited sample--two related cases narrows the generalizability of his claims. In sum, Jones's study does not undermine this paper's claim that adherence to precedence serves important rhetorical functions.[19]

> Indeed, LeDuc found that in so-called Free Speech Decisions, The more vigorous or eloquent the judicial passage being quoted, the less likely it is to be an expression of existing laws.[20]

It seems, then, that Justices are sensitive to the general rhetorical constraints resulting from the audience's expectation that Justices will adhere to precedent. Whenever Justices overturn precedent, they are expected to provide persuasive backing for their new decision.

While adherence to precedent serves as an important constraint, however, the need to respond to changing societal values, social, economic, and political changes, and special circumstances which call principles of Justice and Fairness into question often serves as an equally compelling constraint. As we will see later, this complex constraint plays an important role in shaping the First Amendment context.

A less complex belief shared by members of the composite audience is the view that the Court is not a fact-finding institution. As an appellate Court, the Supreme Court may rule that a trial court misapplied the law to a given factual situation, but the appellate court does not ordinarily re-evaluate the facts.[21] This shared perception of the judicial function serves as a potentially important constraint for judicial invention in all judicial opinions, but plays a particularly important role in shaping the First Amendment context.

In addition to these general composite audience expectations and beliefs, a number of constraints specific to the First Amendment case context play a role in shaping the rhetorical context confronting the authors of First Amendment governmental regulation case majority opinions.

The first particular constraint to be considered here is specific to the type of case discussed in this paper. Because this paper addresses only cases involving governmental regulation of individuals' speech activities, the exigence facing the Justices in each case is a conflict involving the government on the one hand and an individual's freedoms on the other. Because, as Meiklejohn notes, the American people are the government,[22] these cases technically involve conflicts between majority rule and individual freedoms. Indeed, in the cases to be discussed, whenever the Court rules in favor of the individual's First Amendment abridgment claim, the Court is technically holding against majority rule.

This confrontation with majority rule is the subject of Raoul Berger's controversial treatise, Government by Judiciary: The Transformation of the Fourteenth Amendment. Here Berger argues that the Court's "activist" position with respect to the protection of citizens' civil liberties[23] violates basic democratic principles of majority rule.[24] Whether we accept or reject Berger's view, we must grant the underlying premise that judicial holdings for individual speech activity against constitutionally derived acts of legislation are, at least technically, holdings against majority rule.[25] To satisfy the audience's concern for the maintenance of the separation of powers, these cases underscore the general principle that "when employing judicial review, judges must show extreme deference to those who have the responsibility for making the laws."[26]

In the First Amendment governmental regulation case context, this constraint is sharpened by the fact that these cases often involve perceived conflicts between highly valued competing interests. Many of these cases, for example, involve perceived conflicts between fundamental American values: the value of unfettered debate vs. the need to maintain public order; the value of undaunted public inquiry vs. the individual's right to privacy. As the tide of public opinion flows in favor of heavy governmental security measures one decade, so it flows in favor of protecting citizenry from governmental invasions of privacy the next; as it moves from a concern for a real or imagined political menace one decade, so it becomes preoccupied with the need for an unfettered press the next.[27] As these public perceptions waver, authors of Supreme Court

opinions face conflicts between the rhetorical power of adherence to precedent on the one hand and the need to adapt to changing social and political climates on the other. These conflicts themselves serve as rhetorical constraints for judicial invention.[28]

The most common tool Justices employ in attempting to reconcile these seemingly incompatible, yet vital interests is to attempt to balance these interests. Krislov observes that there are two types of balancing available to Justices. Doctrinal balancing--or the "laying down of broad classes of factors to be weighted against one another"--is inevitable in all cases because it is, in fact, "a description of the judicial function per se." Ad hoc balancing, on the other hand, is the weighing of "specific circumstances and considerations of the moment."[29] Though Krislov finds general disfavor with the latter form of balancing he recognizes its predominance in free speech cases. For those employing this method he admonishes against characterization of the conflict in terms of individual rights on the one hand and social benefits on the other. Writes Krislov,

> This form of balance tips the scales. More appropriately, the consideration should be at the same level of analysis. A fairer balance is struck by comparing either the individual net gain in security against a loss in free expression or the societal stake in free speech as against the presumed augmentation of security.[30]

This more balanced scale would no doubt create stronger protection for free speech activities. Furthermore, this more equitable scale would seem to accord well with the audience's concern for judicial impartiality. At the same time, however, a more balanced scale would force Justices to face the complexities inherent in attempting to resolve conflicts between vitally important, yet incompatible interests. Thus even equitable balancing of conflicting interests creates rhetorical constraints for judicial invention.

This constraint is further complicated by the fact that learned scholars disagree on whether the right to free speech should have a "preferred position" in constitutional law. According to Justice Cardozo, free speech is "the matrix, the indispensable condition, of nearly every other form of freedom."[31] Though Krislov acknowledges that the "preference for freedom" is "profoundly rooted in our history," he argues that this doctrine,

> is a weak, inexact, lawyerly instrument, rather less helpful than most in deciding a specific case, prescribing neither a method for decision nor guidance in determining the line between invalidation or acceptance.[32]

Communication scholar Franklyn S. Haiman provides strong support for maintaining the preferred position of free speech. According to Haiman, "Democracy. . . presumes that the suppression of potentially dangerous speech is a cure more deadly than the disease."[33] In contrast, noted political philosopher, Joseph Tussman, argues that "our paradigm of free speech is a highly structured artifact."[34] Tussman argues that because there is "an overwhelming public interest in the condition of the mind," Courts ought to consider replacing the "ubiquitous" view of the forum with an "adequacy" view. Tussman concludes accordingly,

> I'm not sure that everything else should always bear the burden of showing that the pursuit of its purposes requires the exclusion of the forum.[35]

Berger goes so far as to contend that "History reveals that property actually was more highly prized by the Founders than 'civil liberties.'" Berger cites Justice Hand accordingly, "There is no constitutional basis for asserting a larger measure of judicial supervision over liberty than property."[36]

Cases involving First Amendment interests are so laden with controversy that even the views of someone who zealously defended the value of free speech have been used to defend the suppression of speech. Alexander Meiklejohn wrote that, ". . . as interests, the integrity of public discussion and the care for the public safety are identical."[37] He based his position on a distinction between "community thinking speech" and merely private speech. Unfortunately, as Krislov has shown, Meiklejohn offered no "real guidance except intuition in demarcating the two types of expression."[38] Recently, Meiklejohn's distinction has been employed by those who "endorse a rhetorical counter-revolution against sexually explicit communication."[39] Unlike Meiklejohn, today's "Political Speech Only" advocates seem motivated by a desire to limit constitutional safeguards against governmental encroachment on free speech.

Predictably, Justices also face conflicts among themselves between conflicting social and political philosophies. Indeed, Glendon Schubert's extensive scientific study of judicial attitudes leads him to conclude that judicial decisions may be predicted on the basis of the Justices' attitudes and values. Though Schubert acknowledges that external stimuli, including the "whole life experience" of each Justice, impact on judicial attitudes, he contends that judicial decision-making is largely a result of judicial predispositions toward relevant issues.[40] Hence, because Supreme Court Justices are important members of the composite audience, their conflicting predispostions serve as potentially important rhetorical constraints for the authors of First Amendment case majority opinions.[41]

These rhetorical constraints are accompanied by the fact that the First Amendment as written by the Founders of this nation prohibits only Federal abridgments of the rights of free expression, assembly, and religion. The Amendment includes no reference to State abridgments of these rights. Indeed, Thomas Jefferson,

> The great champion of free speech and free press, wrote in 1804 to Abigail Adams; 'While we deny that Congress have a right to control the freedom of the press, we have ever asserted the rights of the states, and their exclusive right to do so.[42]

Berger notes further that "as late as 1922 the Court had held that the Constitution 'imposes upon the States no obligation to confer upon those within their jurisdiction. . . the right of free speech.'[43] In support of this position, Berger argues that,

> the record establishes that the framers had limited objectives; that they carefully avoided encroaching on the States beyond those limits; that they chose technical words apt for their purpose, which, in the case of due process, meant to them access to the courts according to due course of law, not a roving commission to revise State institutions.[44]

Since 1925, in Gitlow v. New York,[45] however, the Court has held that an individual's First Amendment liberties are equally protected from state and federal abridgment through broad interpretation of the Fourteenth Amendment's Due Process Clause.[46] The resulting doctrine has been called a "transmittal" interpretation which 'weakens' the First and "strengthens" the Fourteenth Amendment protections of civil liberties such as free expression, assembly, and religion.

This interpretation places strains on some composite audience members' sense of the judicial function. Recall that the Court is expected to guard jealously the concept of the separation of powers. In 1926, for example, Justice Frankfurter wrote,

> Through its steady expansion of the meaningless meaning of

> the 'due process' clause of the fourteenth Amendment, the Supreme Court is putting constitutional compulsion behind the private judgment of its members upon disputed and difficult questions of social policy.[47]

In 1948, Meiklejohn wrote of the transmittal interpretation, "By judicial fiat, the Constitution of the United States has been radically amended."[48] Berger has unearthed considerable data to support this claim, and, in 1977 challenged Justices to support their move toward acceptance of the transmittal interpretation. According to Berger,

> Under the guise of substantive due process . . . the Court has invaded the exclusive jurisdiction of a sister branch; it has violated the injunction of the separation of powers, made explicit in the 1780 Massachusetts Constitution, that 'the judicial shall never exercise the legislative power.'[49]

This continuing controversy plays a potentially important part in shaping the context in which Justices author First Amendment case opinions.

To summarize, we have seen thus far that the nature of the American tribunal system generates beliefs and concurrent expectations shared by members of the Court's composite audience. Despite their many differences, members of the composite audience share the belief that Justices are required to strive for impartiality. In the American judicial system, adherence to precedent often helps satisfy this belief. Yet sometimes social and political climates change to create a need for judicial flexibility, while maintaining a need for social stability. Justices are expected to adapt their decisions accordingly.

Members of the composite audience also share the belief that the Court must fulfill only those functions appropriate to the highest appellate Court in the American legal system. The Court is expected to function as a tribunal distinguishable from the legislative and executive branches. Further, the court is expected to function as an appellate tribunal, rather than as a fact-finding institution. Furthermore, the Court is confronted with a variety of constraints specific to First Amendment governmental regulation cases. The Court must balance the need to uphold majority rule against the need to guard jealously the individual from arbitrary governmental encroachment of constitutional rights. The Court must somehow reconcile seemingly incompatible, yet vital interests to the satisfaction of its eight particular audiences. The Court must take and maintain a necessarily controversial stance toward the appropriateness of maintaining the "preferred position" of First Amendment rights. Finally, the Court must overcome the rhetorical strains which potentially result from broad interpretation of the First and Fourteenth Amendments.

Appropriate judicial responsiveness to these rhetorical constraints necessarily requires sensitive, coherent, and persuasive argumentation.[50] The following look at the operation of rhetorical invention in two types of First Amendment governmental regulation cases will assess whether the Court has met the rhetorical challenges generated by this complex context.

Part III: Judicial Invention in Two Types of First Amendment Governmental Regulation Cases

In all First Amendment governmental regulation cases, there are two groups of interests represented, those of the government (State or Federal) and those of the individual. Given the situational demands governing this adjudicative context, one of the first tasks appropriate to the judicial function in First Amendment cases is assessment of whether the Court has the constitutional mandate and historical competence to protect the relevant interests. Justice Frankfurter wrote accordingly, "There is a two-fold rule for the Court: 'never seek to enlarge the judicial power beyond its proper bounds, nor fear to carry it to the fullest extent that duty required.'"[51] In cases involving historically

important governmental interests [such as national security] the Court has greater composite audience support to defer to the Government because such deference has strong historical support. In contrast, widely perceived constitutional, common law, and traditional support for judicial protection of the relevant individual interest provides strong backing for rigid judicial scrutiny of governmental behavior.

In accordance with the audience's expectations, therefore, assessment of the judicial function in each case must begin with a characterization of the competing interests. First, the Court characterizes the individual's constitutionally protected interest; next the Court determines the government's interest (or purpose) in suppressing the individual's constitutionally protected behavior; third, the Court must determine whether the governmental agency has jurisdiction over its stated interests; and finally, the Court determines whether the governmental policy as practiced is reasonably related to the government's legitimate interest.[52] Among the different types of judicial approaches to these four steps perhaps the most oft discussed tool of judicial justification in First Amendment governmental regulation cases is the so-called "clear and present danger test" introduced by Justice Holmes for a unanimous Court in Schenck v. United States, Debs v. United States, and Frohwerk v. United States.[53] Thus, the discussion to follow will focus on judicial invention in these and other cases involving the clear and present danger test. It is important first, however, to review briefly the history of the clear and present danger test.

Despite its unanimity in the World War I cases, the Court replaced the clear and present danger test with a type of rational basis, deference test in Whitney v. California and in Gitlow v. New York.[54]

The Whitney and Gitlow majorities used the transmittal theory to apply traditional due process criteria to the government's behavior. Justice Sanford wrote for the majority in Whitney:

> We cannot hold that, as here applied, the [Criminal Syndicalism Act of California] is an unreasonable or arbitrary exercise of the police power of the State. . . .
> He wrote for Gitlow majority:
> We cannot hold that the present statute [New York Fenal Law on criminal anarchy] is an arbitrary or unreasonable exercise of the police power. . . .Every presumption is to be indulged in favor of the validity of the statute.

Justice Sanford's mix of judicial "activism" [through adherence to the transmittal interpretation of the First and Fourteenth Amendments] and deference [through the application of traditional due process criteria] offers an interesting tool for judicial justification in this type of case. Yet such an approach creates a powerful presumption for the government in these cases. After 1927, the Court replaced these deferential due process criteria in First and related Fourteenth Amendment cases with more assertive methods of scrutiny, such as those developed by Justice Holmes in the World War I cases. Given their historical importance, these cases warrant close study.

The relevant statute in Schenck and the related World War I cases is the Espionage Act of June 15, 1917 which created three new federal offenses. When the United States is at war, whoever,

> Willfully makes or conveys false reports or false statements with the intent to interfere with the operation of success of United States military or naval forces; causes insubordination, disloyalty, mutiny, or refusal of duty in these forces; obstructs the recruiting or enlistment of service of the United States, to the injury of the service or of the United States; shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both.

The defendants in Schenck were convicted under this statute for willfully conspiring "to have printed and circulated to men who had been called and accepted for military service. . . a document. . . alleged to be calculated to cause such insubordination and obstruction." They were also charged with using "the mails for the transmission of matter declared to be nonmailable." The document in question provided an admonition to citizens that they recognize their "right to assert opposition to the draft." The defendants did not deny that they intended to influence people to obstruct the carrying out of the draft.

Given these facts, the Court had little trouble characterizing important competing interests. The governmental interest in national security, especially in time of war, strongly favors a judgment of presumption for the government. The Court could argue, for example, that every freedom enjoyed by American citizens, including freedom of speech, would be imperiled if the country's national security were in jeopardy. Predictably, the Schenck majority placed great value on the government's interest in protecting the country against those who would impair the war effort.

The Court also recognized, however, the importance of the defendants' First Amendment rights. The defendants were all convicted for publicly expressing controversial ideas. The Schenck defendants attempted to distribute arguments for obstructing the draft through non-violent means. Debs was convicted for giving an anti-war speech. Debs, who received [while in prison] over 90,000 votes as the Socialist candidate for presidency, had expressed sympathy "and admiration for [socialists imprisoned for obstructing the recruiting services] and others convicted for similar offenses." The defendants in Frohwerk were convicted for conspiring to obstruct recruitment by distributing articles about which Justice Holmes wrote,

> So far as the language of the articles goes there is not much to choose between expressions to be found in them and those before us in Schenck v. United States.

Given these facts, the Court could easily argue that because the defendants' interests were explicitly protected by the language of the Constitution, these interests are most in need of constitutional safeguards. The Court could insist that only the judiciary could protect the constitutional rights of political dissidents from explicit congressional infringements of the First Amendment. On face value, then, there seemed to be ample constitutional grounds for a judgment of presumption favoring the individuals. The Court did, in fact, technically place the burden of proof on the legislature. But it did so with important qualifications. In Schenck, for example, the Court's choice of language deemphasized the individuals' rights to constitutional safeguards. Justice Holmes wrote,

> We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights.

Justice Holmes juxtaposes this concession to the individuals' rights with an analogical locus,

> The most stringent protection of free speech would not protect a man in falsely shouting fire in a crowded theatre and causing panic.

Next, Justice Holmes proposes the commonplace, "the character of every act depends upon the circumstances in which it is done."

Given the importance of the government's interest in these cases, the unusual context (wartime) in which the individuals attempted to exercise their rights to free expression, and the function of the Court as guardian of the Constitution, Justice Holmes' position provided persuasive backing to the Court's composite audience for the Court's use of a particularized judgment. Yet this method of decision making necessarily depends upon difficult empirical analyses outside the traditional scope of judicial reasoning. As such, this type of

judicial scrutiny places considerable strain on the composite audience's sense of the judicial function. Unfortunately, judicial efforts to apply the clear and present danger test have failed to provide reassurance to concerned audiences. Indeed, as the discussion to follow will show, the Court's applications of these standards have fallen seriously short of the expectations audiences have of judicial invention in these cases.

Justice Vinson contended in Dennis that the Court has, since 1927, employed the approaches developed by Holmes and Brandeis in their Whitney concurrence and Gitlow dissent:

> Although no case subsequent to Whitney and Gitlow expressly overruled the majority opinions in those cases, there is little doubt that subsequent opinions have inclined toward the Holmes-Brandeis rationale.[55]

As set forth by Justices Holmes and Brandeis in these famous minority opinions, the clear and present danger test would seem to provide considerable protection for First Amendment interests. Here Justices Holmes and Brandeis argue first that the "general principle of free speech" is protected by the Fourteenth Amendment and second that this protection must be jealously guarded in the absence of strong reasons to suppress that speech.

Justices Brandeis and Holmes developed an argument by authority in their Whitney concurrence,

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary.

This appeal to the values of America's heroes also draws upon the commonplace, "a government ruled by the reasonable is superior to a government ruled arbitrarily." Justices Brandeis and Holmes next appeal to the universal desire for happiness and admiration of courage,

> They believed liberty to be the secret of happiness and courage to be the secret of liberty.

Next they appeal to the readers' desire for truth,

> They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth. . . .

Finally, they draw upon the readers' concern for national security,

> But they knew that order cannot be secure merely through fear of punishment for its infraction;. . . that fear breeds repression; that repression breeds hate; that hate menaces stable government. . . .

Justices Brandeis and Holmes conclude this paragraph with another appeal to reason,

> Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law--the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

As guardian of the Constitution, the Court has the "responsibility" to protect individuals from these "occasional tyrannies."

Having established both the need for such a guarantee and the judicial role in providing such protection, Justices Brandeis and Holmes provide criteria (compatible with their previous appeals to reason) for judicial scrutiny of legislative behavior,

> To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one. . . .

In Fifth Amendment Due Process cases, the term "reasonable" is used as shorthand for the expression, "The Court can conceive of a possible legislative reason for." Although Justices Brandeis and Holmes are addressing State infringement of the Constitution (and are therefore applying the Due Process Clause of the Fourteenth Amendment), they define "reasonable" narrowly,

> In order to support a finding of clear and present danger it must be shown either that immediate serious violence was to be expected or was advocated, or that the past conduct furnished reason to believe that such advocacy was then contemplated. . . .
>
> It is therefore always open to Americans to challenge a law abridging free speech and assembly by showing there was no emergency justifying it. . . .
>
> Whenever the fundamental rights of free speech and assembly are alleged to have been invaded, it must remain open to a defendant to present the issue whether there actually did exist at the time a clear danger; whether the evil apprehended was one so substantial as to justify the stringent restrictions interposed by the legislature.
>
> The legislative declaration creates merely a rebuttable presumption that these conditions have been satisfied. (my italics)

This line of reasoning assumes that the Constitution protects the rights of speech, assembly, and religion equally from both state and federal infringement. The values to which Justices Brandeis and Holmes appeal--governmental stability, reasonableness, truth-administration, wise decision making, individual independence, self-determination, and a respect for authority--provide sources for judicial assertiveness in all governmental regulation cases. In short, they provide material for justification of the "preferred" position of First and related Fourteenth Amendment rights in Supreme Court adjudication. They also allow the Court to use both the language of due process ("reasonable relation") and the language of strict scrutiny ("clear and present danger," "compelling state interest").

This eloquent expression of the "clear and present danger test" would seem to provide considerable protection against governmental encroachment of free speech. According to Zechariah Chafee, for example,

> a Supreme Court comprising and influenced by men who really want to preserve the great American traditions of freedom of speech now has in its arsenal two weapons which were not available in 1917, Justice Holmes' test of "clear and present danger" and the Fourteenth Amendment, which was unused for the maintenance of open discussion until the Gitlow case.[56]

Yet a closer look at the Court's applications of the "clear and present danger test" since 1927 reveals that the Court has often violated the spirit

with which Justices Holmes and Brandeis set forth this standard.[57] This discussion will also reveal that judicial invention in cases employing this test has failed to respond appropriately to the rhetorical constraints described in Part Two of this paper.

Perhaps the best example of judicial misapplication of the "clear and present danger test" appears in Dennis vs. United States.

The Dennis defendants, alleged members of the Communist Political Association, were accused of conspiring to organize a group which advocates the overthrow or destruction of the Government of the United States by force and violence. They were not charged with advocating such overthrow, nor were they charged with attempting to overthrow the government. As the trial judge urged, the defendants could not be found guilty unless the jury was "satisfied beyond a reasonable doubt that they (the defendants) conspired to organize a society, group and assembly of persons. . . who teach and advocate (such overthrow) with the intent to cause the overthrow or destruction of the Government of the United States by force and violence as speedily as circumstances would permit."[58] They were punishable for these offenses under sections two and three of the Smith Act:

> Section 2(a) It shall be unlawful for any person--
> (paraphrase) to knowingly advocate or teach the violent overthrow of the Government,
>
> (paraphrase) to organize or help to organize a group which teaches or encourages the violent overthrow of the Government, or to become a member of such an organization.

Section 3.

> "It shall be unlawful for any person to attempt to commit, or to conspire to commit, any of the acts prohibited. . . by this title."

The Smith Act, enacted by Congress in 1940, resulted in the punishment of persons for expressing politically unpopular ideas. Using the Schenck rationale, these facts warranted a judicial judgment of governmental justification of the facts. That is, under the Schenck rule, the constitution prohibits congressional regulation of speech unless the exercise of free speech presents a clear and imminent danger to a substantial government interest.

The Court characterized the Government's interest as preventing "the overthrow of the Government by force and violence." The Court described this interest as:

> . . . certainly a substantial enough interest for the Government to limit speech. Indeed, this is the ultimate value of any society, for if a society cannot protect its very structure from armed internal attack, it must follow that no subordinate value can be protected.

Having established a substantial interest which Congress may protect, the Court's next step was to determine whether the defendants' protected speech behavior created a clear and present danger to the government's substantial interest. Because this type of judgment places the Court outside the scope of decision making historically associated with judicial competence, the Justices carefully drew upon audience's values to back the Court's particularized judgment.

The opinion opens with a citation of the relevant sections of the Smith Act. The majority next repeat conclusions of the Court of Appeals regarding the growing threat of the Communist Party. The majority next characterize the individuals' interest,

> (The application of the Smith Act) in this case has resulted in the convictions for the teaching and advocacy of the overthrow of the Government by force and violence, which, even though coupled with the intent to accomplish that overthrow, contains an element of speech. . . . (my italics)

This characterization compares interestingly with the Court's description of the Government's interest as the "ultimate value of any society." Yet the defendants were not charged with conspiracy to overthrow the government. They were charged with conspiracy to form a group which teaches or advocates violent overthrow. The majority's attempt to establish a clear connection between this conspiracy--or agreement to form a political group--and an actual immediate threat of violent overthrow posed difficult problems for them. Their controversial opinion, signed by only four Justices (not technically a majority), argued that the Government was justified in suppressing the rights of these individuals because their conspiracy to form a group of "dangerous advocates" posed an imminent threat to the security of the country. The Court's particularized judgment was based primarily on the existence of a worldwide Communist conspiracy (determined by the Court off the record) in which the defendants were alleged to play a dangerous role. The 16,000-page factual record never established this crucial connection. The Dennis majority's enthusiastic attempt to administer its particularized judgment in this controversial case, then, fell short of the expectations created by Schenck and the other World War I cases.[59] In a later governmental regulation case involving the Smith Act, the Court attempted to avoid this problem by minimizing its responsiveness to an unstable political climate.

Yates v. United States[60] involved the Smith Act convictions of a number of "lower echelon" Communists. The majority opinion in Yates (signed by the requisite five Justices) used statutory construction to avoid some of the problems inherent in any particularized judgment. The Yates majority distinguished between "advocacy of abstract doctrine" and "advocacy of action." According to the majority, the Smith Act does not prohibit "advocacy and teaching as an abstract principle." The majority supported their preoccupation with this distinction between types of advocacy by appealing to their traditional role, "our first duty is to construe the statute." Recognizing their apparent departure from Dennis, the Yates majority argue that the "essence" of the Dennis holding was relevant to "indoctrination preparatory to action" rather than "a conspiracy to engage at some future time in seditious advocacy." This move was particularly important for the Yates majority because they reversed a lower court's judgment which was based on Dennis.

This interpretation of the Dennis holding, as well as the Court's innovative interpretation of the Smith Act, permitted the Court to avoid facing some of the problems inherent in application of the clear and present danger test. The Court did not, for example, face questions of proximity and degree. The Court also avoided having to make an explicit choice between highly valued but conflicting interests. Finally, the Yates strategy permitted the Court to focus on issues traditionally associated with the judiciary, such as questions of evidence and statutory construction.

However, the Court's attempt to avoid some of the problems implicit in any particularized judgment created new justificatory problems. For example, the Court's distinction between advocacy of action and advocacy of abstract doctrine is, as Justice Harlan suggests, "often subtle and difficult to grasp." This distinction between types of advocacy creates significant judicial discretion which invites the Court to trade constitutionally prescribed standards with ad hoc analysis. This problem becomes especially evident when the Court attempts to distinguish between types of speech behavior in the governmental regulation cases involving so-called "penumbra" interests to be discussed shortly. The Yates strategy also creates the expectation that the Court will justify its departure from clear and present danger standards. Neither the Yates majority nor the Scales majority fulfills this difficult expectation.

Yet another Smith Act case, Scales v. United States[61] involved the membership clause (section 2a, 2) of the Smith Act "makes a felony the acquisition

or holding of knowing membership in any organization which advocates the overthrow of the Government of the United States by force or violence." The majority focussed on "substantive constitutional standards" to sustain the statute which the majority interpret as requiring "specific intent" and "active" rather than "nominal" membership.

> Justice Harlan wrote for the majority:
> It was settled in Dennis that the advocacy with which we are here concerned is not constitutionally protected speech, and it was further established that a combination to promote such advocacy, albeit under the aegis of what purports to be a political party, is not such association as is protected by the First Amendment.

This characterization of the Court's Dennis (1951) ruling would ordinarily suggest that the Scales defendants had no relevant interest; that the Court would defer. Yet the majority went on to characterize individual interests of sufficient importance to justify their use of non-deference norms. Relying on their opinion in a companion case--Noto v. United States[62]--the Scales majority argued that not all associations with "illegal" organizations were susceptible to prosecution under the Smith Act,

> There must be clear proof that a defendant 'specifically intends' to accomplish the aims of the organization by resort to violence

In his essay, "Protecting Political Speech: Brandenburg v. Ohio Updated," Paul Siegel shows that,

> The current test used by the Supreme Court in determining whether a particular act of advocacy should enjoy first amendment protection was set forth in Brandenburg v. Ohio . . . . Implicitly, any advocacy which falls short entirely of a call for illegal action is wholly protected (assuming it does not fall into other categories of unprotected speech, such as libel or obscenity). More crucially, speech which does call for illegal action can still be protected so long as either of these two conditions obtains: a] the illegal action is not being sought immediately, or b] there is reason to believe that the listeners will not actually commit the illegal action.[63]

In their opinion the Brandenburg majority write as if this standard were not new. Yet, as Seigel shows, "the very combination of the requirements of 'incitement to illegal action' and that lawfulness should be 'imminent'" is unique to the Brandenburg decision.

Here, as elsewhere, the Court has failed to conform to the composite audience's reasonable expectations. The Court has rendered a set of inconsistent, and often incoherent, opinions in this area of adjudication. Confused expressions of constitutional interpretation are often left unsupported by history or by a treatment of ideology which would assure members of the composite audience that the Court has made decisions appropriate to America's highest appellate Court. At first glance one might be tempted to attribute these shortcomings to the difficulty of reasonably and equitably administering the "clear and present danger test." Yet a quick look at judicial efforts to administer different standards in another set of cases will reveal that the Court's shortcomings are not limited to administration of the "clear and present danger test."

In this set of cases, the Court uses expressions such as "speech in its pristine form," "pure speech," "fighting words," and other characterizations of speech behavior to distinguish between protected and unprotected speech activity. In Cox v. Louisiana (Cox II), [64] for example, the Court argues that

"picketing and parading" is "expression mixed with conduct." The majority argue further that picketing and parading are not "speech in its pristine form" but are rather examples of "conduct of a totally different character." Yet in Edwards v. South Carolina,[65] decided only two years before Cox II, the majority held that the assembly of 187 black high school students at the site of the South Carolina State Capitol to protest "the present condition of discriminatory actions against negroes" was "an exercise of First Amendment rights in their most pristine and classic form." And in Cox v. Louisiana (Cox I),[66] the majority described the defendants' behavior as "strikingly similar" to that of Edwards defendants. Yet the majority in Cox II--a case involving the same behavior but a different statute--describes this behavior as "conduct of a totally different character." This discrepancy is one of many in the Court's attempts to distinguish between types of speech behavior.[67]

In Chaplinsky v. New Hampshire[68] the majority offered the following oft cited passage:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problems. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words. . . .

Yet in New York Times v. Sullivan (1964)[69] Justice Brennan observes that obscenity, advocacy of unlawful acts, libel and other forms of "unacceptable" speech, can claim no talismanic immunity from constitutional limitations." Justice Brennan observes further that these types of behavior, "must be measured by standards that satisfy the First Amendment." This characterization of judicial rules is supported by the Court's judgment in Terminiello v. Chicago.[70] Here the majority per Justice Douglas held that speech which "stirs the public to anger, invites dispute, or creates a disturbance' may be protected because

> A function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.

In sum, the Court's distinctions between types of speech activity provide little guidance for understanding the basis of so-called "penumbra" interest decision making. Here, as in the administrations of the clear and present danger test, the Court has failed to meet the audience's expectations. The Court has rendered a set of inconsistent, often incoherent opinions. In more recent cases the Court has simply assumed its authority over historically legislative interests. Additionally, the Court has adopted and misapplied traditionally legislative and executive methods of inquiry.[71] In many cases the Court's "strategies" have resulted in the legitimization of free speech suppression. Franklyn Haiman offers a succinct summary of the problem. In his review of Supreme Court cases involving free speech issues, Haiman noted,

> To say that those decisions have left something to be desired in terms of consistency, predictability, and logical adequacy would be an understatement. Too often the opinions of Supreme court justices on free speech issues have been superficial in their analyses, unguided by consistent principles, responsive to popular prejudices, and excessively deferential to legislative intrusions into areas that are questionably within the legitimate province of the law.[72]

In addition to the immediate dangers posed by these cases is the long-term threat posed by inappropriate judicial responsiveness to the rhetorical demands posed by the First Amendment context. As Ball suggests,

> the symbol of the Court as a fair and just tribunal where constitutional arguments will be made and carefully evaluated

by the justices is a symbol of fundamental societal importance.[73]

To insure that the Court retains its authority to protect free speech, the Court's critics must continue to focus on the Court's rhetorical responsibilities. Only through preservation of the Court's authoritative ethos, achieved through judicial invention which responds appropriately to the First Amendment context's rhetorical demands, will free speech retain its most important bulwark against arbitrary governmental encroachments.

Endnotes

[1]Lloyd Bitzer, "The Rhetorical Situation," Philosophy and Rhetoric 1 (January, 1968), 2.

[2]Howard Ball, Judicial Craftsmanship or Fiat?: Direct Overturn by the United States Supreme Court, (Westport: Greenwood Press, 1978), p. 144.

[3]Larry Charles Berkson, The Supreme Court and Its Publics, (Massachusetts: Lexington Books, 1978).

[4]Berkson, p. 11.

[5]Lawrence Baum, The Supreme Court, (Washington, D.C.: Congressional Quarterly Press, 1981).

[6]Alexander Hamilton assured early opponents of the judicial branch that because the Court lacked both purse and sword it would be ". . . beyond comparison the weakest department of power." Alexander Hamilton, James Madison, and John Jay, The Federalist Papers, (New York: The New American Library of World Literature, Inc., 1961), p. 465.

[7]Baum, p. 19.

[8]Charles A. Miller, The Supreme Court and the Uses of History, (Cambridge: The Belknap Press of Harvard University Press, 1969), pp. 11-12, cited in Candiss Baksa Vibbert, "The Role of Values in Supreme Court Opinions as Legal and Cultural Force," p. 1, unpublished manuscript presented at the Fifth International Conference on Culture and Communication, March, 1983, Phladelphia.

[9]Philip Kurland, Politics, the Constitution, and the Warren Court, (Chicago: University of Chicago Press, 1969) p. 23.

[10]Franklyn S. Haiman, Speech and Law in a Free Society, (Chicago: University of Chicago Press, 1981), p. 3.

[11]Ball, p. 148.

[12]Berkson, p. 65.

[13]The expression "composite audience" used in this paper is borrowed from Chaim Perelman and L. Olbrechts-Tyteca, The New Rhetoric: A Treatise on Argumentation, trans., John Wilkinson and Purcell Weaver, (London: University of Notre Dame Press, 1969). On p. 22, Perelman and Olbrechts-Tyteca write that audiences of parliamentary speeches form a "type of composite audience whose constituent elements are readily discernible." The term "composite audience" will be used in this paper to refer to the "readily discernible" beliefs and expectations shared by the Court's eight groups of particular audiences.

[14]Berkson, p. 93. Baum describes this expectation as a "widespread belief that the Court should be nonpolitical. . . ." According to Baum, however, this and other related beliefs are a part of the Court's political nature. Baum contends that the Supreme Court should be viewed as both a political and a legal institution. "What it does and how it operates are influenced both by the political process and by the legal system." Baum, p. 2.

[15]Black's Law Dictionary, (St. Paul: West Publishing Co., Revised Fourth Edition, 1968), p. LXXI.

[16]Ball, xii.

[17]Ball, p. 4., citing Roscoe Pound's "The Status of the Rule of Judicial Precendent."

[18]Richard A. Wasserstrom, The Judicial Decision: Toward a Theory of Legal Justification, (Palo Alto: Stanford University Press, 1961), p. 83. Wasserstrom's italics.

[19]See Stephen B. Jones, "Justification in Judicial Opinions: A Case Study," Journal of the American Forensic Association 12 (1976), 128. For a discussion of the important legal and rhetorical functions served by "underlying principles," see Benjamin Cardozo, The Nature of the Judicial Process, (London: Yale University Press, 1969).

[20]Don R. LeDuc, "'Free Speech' Decisions and the Legal Process: The Judicial Opinion in Context," Quarterly Journal of Speech 62 (Oct., 1976), 279.

[21]See, for example, Overbeck and Pullen, Major Principles of Media Law, (New York: Holt, Rinehart, and Winston, 1982), p. 3; and William Lyon Benoit, "An Empirical Investigation of Argumentative Strategies Employed in Supreme Court Opinions," in Dimensions of Argument: Proceedings of the Second Summer Conference on Argumentation, George W. Ziegelmueller and Jack L. Rhodes, eds., [Annandale: Speech Communication Association, 1981]. pp. 179-195.

[22]See Alexander Meiklejohn, Political Freedom: The Constitutional Powers of the People, (New York: Harper and Row Brothers, 1948), esp. "Free Speech and Its Relation to Self-Government," pp. 8-92. Meiklejohn argues that the people are the government through an explicit compact.

[23]Baum shows that the Court has in fact "been quite favorable to civil liberties in judging conflicts between those liberties and other values." Baum, p. 167. See also Baum's graph of judicial decision-making patterns, p. 168.

[24]Raoul Berger, Government by Judiciary: The Transformation of the Fourteen Amendment, (Cambridge: Harvard University Press, 1977), p. 250.

[25]This precept is significantly less evident in cases involving the press. Here it may be argued that judicial holdings for the press against acts of legislation are holdings protecting the separation of the press (or "Fourth Estate" of the people) from undue governmental control.

[26]Ball, p. 90.

[27]For an insightful discussion of this phenomenon, see William I. Gordon and Dominic A. Infante, "Attitudes Toward Free Speech: Trends, Measurement and Individual Difference Considerations," in Free Speech Yearbook 1980, (Annandale, Va: Speech Communication Association, 1981) pp. 112-15.

[28]Glendon Schubert offers empirical data to argue that in practice only those Justices who are themselves "least intense in their attitude toward the C-scale issues"--issues involving civil liberties--are likely to respond extensively to "external stimuli." See The Judicial Mind, (Evanston: Northwestern University Press, 1965). Schubert's findings regarding judicial decision making do not, however, mitigate against the rhetorical significance judicially responsive rhetorical invention has in this legal context.

[29]Samuel Krislov, The Supreme Court and Political Freedom, (New York: The Free Press, 1968), p. 111

[30]Krislov, p. 113.

[31]Palko v. Connecticut, 302 U.S. 319, 327 (1937).

[32]Krislov, pp. 118-119.

[33]Haiman, Speech and Law in a Free Society, p. 98. See this book generally for a persuasive defense of the "preferred position" concept.

[34]Joseph Tussman, Government and the Mind, (Oxford: Oxford University Press, 1977), p. 100.

[35]Tussman, pp. 11 and 172.

[36]Hand, at 50, 51, cited in Berger, p. 267.

[37]Meiklejohn, p. 57.

[38]Krislov, p. 97.

[39]Franklyn S. Haiman, "Nonverbal Communication and the First Amendment: The Rhetoric of the Streets Revisited," Quarterly Journal of Speech 68 (1982), 376.

[40]Schubert. See also, Glendon Schubert, "Judicial Attitudes and Voting Behavior," in Federal Judicial System, Sheldon Goldman and Thomas Jahnige, Eds., (Hinsdale, IL: Dryden Press, 1968), pp. 254-282. For a useful summary of Schubert and a companion essay, "Voting Behavior in the United States Supreme Court," by C. Herman Prichett (pp. 216-232), see Ruth McGaffey, "Toward A More Realistic View of the Judicial Process in Relation to Freedom of Speech," in Free Speech Yearbook: 1972, (New York: Speech Communication Association, 1973), pp. 8-20.

[41]For an interesting discussion of the role these conflicts play in judicial politics, see Walter Murphy, Elements of Judicial Strategy, (Chicago: University of Chicago Press, 1964).

[42]September 11, 1804, cited in Berger, p. 272.

[43]Prudential Inc. Co. v. Cheek, 259 U.S. 530, 538 (1922), cited in Berger, p. 270.

[44]Berger, p. 273.

[45]Gitlow v. New York, 268 U.S. 652 (1925).

[46]This clause reads: ". . .nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Meiklejohn argued that the freedom of speech covered under the First Amendment was non-abridgable, while the liberty of speech implied by the language of the Fourteenth Amendment was abridgable. However, as was noted earlier, Meiklejohn provided no criteria for applying this distinction. See Meiklejohn, pp. 36-50 and Krislov, pp. 96-97.

[47]New Republic (1926), cited in Berger, p. 260.

[48]Meiklejohn, p. 54.

[49]Berger, p. 250.

[50]Interestingly, this context seems to fit many of the requisites of an institutional genre. Though time and space do not permit pursuit of this concept here, I would encourage the reader to give this idea further consideration. For a useful discussion of genres, see Karlyn Kohrs Campbell and Kathleen Hall Jamieson, Form and Genre: Shaping Rhetoric Action, (Falls Church, Virginia: Speech Communication Association, 1976); Kathleen M. Hall Jamieson, "Generic Constraints and the Rhetorical Situation," Philosophy and Rhetoric 6 (Summer, 1973),162-170; Edwin Black, Rhetorical Criticism: A Study in Method, (New York: MacMillan, 1965); Jackson Harrell and Wil A Linkugel, "On Rhetorical Genre: An Organizing Perspective," Philosophy and Rhetoric 11 (Fall, 1978), 262-281; and the "Special Report on Rhetorical Criticism," in Western Journal of Speech Communication 44 (Fall, 1980), esp. 288-315 and 331-350.

[51]West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943), at 630.

[52]Haiman contends that "Reasonable regulations as to time, place, and prior notification are premissible, but rules which make possible arbitrary or prejudicial governmental restraints on speech are not." As this paper will show, Justices often fail to adhere to this principle. Franklyn. S. Haiman, Freedom of Speech; Issues and Cases, (New York: Random House 1965), p. 16.

[53]Schenck v. United States, 249 U.S. 211; Debs v. United States, 249 U.S. 211; and Frohwerk v. United States, 249 U.S. 204; all in 1919.

[54]Whitney v. California, 274 U.S. 357 (1927); and Gitlow v. New York, 268 U.S. 652 (1925).

[55]Dennis v. United States, 341 U.S. 491 (1951).

[56]Zechariah Chafee, Jr., Free Speech in the United States, (Cambridge: Harvard University Press, 1954), p. 325.

[57]Interestingly, as early as 1948, Meiklejohn recognized the dangers inherent in adoption of this test. Meiklejohn wrote that this judicial formula offers "an exception to the principle (of free speech) rather than an interpretation of it." p. 31. See pp. 29-50 for Meiklejohn's criticism of the test.

[58]From the trial judge's charge to the original Dennis jury.

[59]Cases such as these reenforce the need for careful scrutiny of judicial activity in this area of adjudication. Franklyn Haiman writes appropriately, ". . .one can only marvel at the rationalizations a society will invent to justify suppression of the deviant." Franklyn S. Haiman, "The Rhetoric of the Streets: Some Legal and Ethical Considerations," The Quarterly Journal of Speech 53 (April, 1967), 109.

[60]Yates v. United States, 354, U.S. 298, (1957).

[61]Scales v. United States, 367 U.S. 203 (1961).

[62]Noto v. United States, 367 U.S. 290 (1961).

[63]Paul Siegel, "Protecting Political Speech: Brandenburg v. Ohio, Updated," Quarterly Journal of Speech 67 (February, 1981), 69-80.

[64]Cox v. Louisiana (Cox II, 379 U.S. 559 (1965)

[65]Edwards v. South Carolina, 372 U.S. 229 (1963).

[66]Cox v. Louisiana (Cox I), 379 U.S. 536 (1965).

[67]For a critical discussion of these cases, see Haiman, "Nonverbal Communication and the First Amentment. . . ."

[68]Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[69]New York Times v. Sullivan, 376 U.S. 254 (1964): Let the reader note that unlike the rest of the cases discussed here, this case involves the press.

[70]Terminiello v. Chicago, 337 U.S. I (1949).

[71]For an intersting criticism of the Court s applications of the clear and present danger test, see William Bailey, "The Supreme Court and Communication Theory: Contrasting Models of Speech Efficacy," in Free Speech Yearbook: 1980, ed., Peter E. Kane, (Annandale, Virginia: Speech Communication Association, 1981), pp. 1-16.

[72]Haiman, Speech and Law in a Free Society, p. 4.

[73]Ball, p. 144.

BOOK CENSORSHIP: A STRATEGY OF ORDER FOR THE FIREMEN IN FAHRENHEIT 451 AND MORAL MAJORITY, INC.

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Ray Bradbury, a noted author of science fiction, maintains two arguments about book censorship: (1) there is more than one way to burn a book and (2) minorities are responsible for lighting the matches. His support for these arguments is found in the 1979 "Afterword" to Fahrenheit 451 and in the novel itself, first published in 1953.[1] The "Afterword" was written in response to over thirty years of censors protesting his literature. The novel depicts a hypothetical state wherein all reading material is forbidden and burned by firemen at 451 degrees Fahrenheit--the temperature at which book paper catches fire.

However, current incidents of book censorship in the United States provide empirical evidence for Bradbury's arguments. The book censors of the eighties prove that there is more than one way to burn a book. They use tactics such as protests, bombings, assaults, threats, boycotts, displacement and/or dismemberment of texts, and restricted access to books in libraries.[2] The minorities responsible for lighting the matches in the eighties are visible and powerful fundamentalists, anti-feminists, feminists, and individual parents who feel that society has moved in the wrong direction.[3] Their targets are public schools and libraries--institutions which are convenient, accessible, and emblematic of the whole system.[4] Their strategy is the censorship of books and instructional materials which are viewed as anti-Christian, anti-authority, anti-American, and anti-family.[5] Their demands have resulted in an unprecedented increase of book censorship across the nation. The American Library Association, the National Council of Teachers of English, and the National Education Association claim that the pressures of book censorship have never been more severe than they are now in the eighties, especially since the 1980 elections.[6]

Perhaps the most prominent source of the pressure is Moral Majority, Inc.[7] This influential minority favors strict regulation of allegedly "immoral" and "unchristian" books.[8] More importantly, these Christian lobbyists bear a striking resemblance to the firemen in F451. Both groups share a similar strategy for maintaining and achieving order in society--book censorship.

The development of this parallel warrants the attention of free speech scholars for several reasons. When the radical actions of the firemen are juxtaposed with the actions of MM, the rhetorical implications of the novel are intensified. Bradbury's world of the future becomes more fact than fiction, more plausible than implausible; likewise, book censorship by MM becomes more intolerable than tolerable, more unjustifiable than justifiable. Of greater significance is that the parallel exposes book censorship as an encroachment upon the freedom of speech.

This essay provides a comparative analysis of the firemen in F451 and MM. The analysis is limited to the strategy of book censorship as a method for maintaining and achieving order in society. Another limitation is the definition of censorship, which, as used in this study, refers to "any attempt to suppress materials presenting certain viewpoints, or to exclude those viewpoints from library and classroom materials."[9] Structuring this essay necessitates (1) identifying the concept of order and its relationship to Kenneth Burke's theory of the dramatistic process, (2) applying this process to the strategy of book censorship as employed by the firemen and MM (4) comparing the implementation of the strategy, and (5) determining the implications for free speech.

Order and the Dramatistic Process

Kenneth Burke defines humans as "symbol-using animals (symbol-making and symbol-misusing)," who are motivated by the need for order in their social relationships.[10] He considers order as not just regularity in a process, but as a distribution of authority.[11] This distribution takes the form of a pyramid or hierarchy that represents the power relationships among people in society.[12] Burke describes the search for order in human relationships as the dramatistic process.[13] It can be explained by considering the interrelationships of (1) hierarchy, (2) acceptance and rejection, and (3) guilt, purification, and redemption.[14]

Hierarchy represents the form or arrangement of order in a dramatistic society. Burke believes that all humans are ". . . goaded by the spirit of hierarchy (or moved by the sense of order) and rotten with perfection."[15] By this he means that people strive for the perfect order or the "reign of reason and justice" in an effort to induce cooperation through language.[16] All such order is hierarchical; that is, it involves divisions of authority between humans who are bound together by the rights and obligations of a system. The unity yet division created by hierarchy can be found in school groups, family units, political organizations, and other human "bureaucracies."[17]

The tendency to accept or reject hierarchies is another concept of the dramatistic process. In the drama of human conduct, what one person can accept in a hierarchy, another rejects. The reaction of acceptance or rejection is symbolized by language. Acceptance follows from a positive reaction to the hierarchy, resulting in satisfaction and order.[18] Rejection is a negative reaction to hierarchies in the human situation. When this occurs, an individual becomes estranged from the particular hierarchy and disorder reigns.[19]

The effects of acceptance and rejection of the hierarchy are guilt, purification, and redemption. Burke likens these actions to the unfolding of a stage drama: "Order leads to Guilt (for who can keep commandments!). Guilt needs Redemption (for who would not be cleansed!)."[20]

Guilt is a feeling acquired when an individual rejects the hierarchy through the misuse of symbols. Burke argues that guilt is inherent in the nature of society and in the nature of hierarchy. The complexities of society impose numerous changes on traditional hierarchies such as the family, school, and church.[21] When one hierarchy is in conflict with another, rejection of one will occur and the feeling of guilt will follow.[22] More often, when the differences in authority between superiors and subordinates conflict, the nature of the hierarchy is the source of guilt. It is not merely the inherited differences of sex, age, social status, or other conditions of life that drive humans apart, but their ambitious natures which create a guilt that is inherent in the hierarchy itself.[23] Lower classes always covet the privileges of upper classes and the latter always possess the power to reinforce their privileges.[24] But just as it is human nature to reject the hierarchy, it is also human nature to desire the security of a restored or renovated hierarchy; this requires the cancellation of guilt.[25]

Purification is the transformation from the state of guilt in the dramatistic process to the state of redemption.[26] The act of purification can be either mortification or victimage. Mortification is a voluntary act of self-punishment that relieves a human of guilt. Victimage requires the sacrificial offering of a scapegoat that bears the blame and the punishment for the guilty. The act of purification must match the degree of guilt if guilt is to be canceled and redemption is to be achieved.

The final concept of the dramatistic process, redemption, is the state of perfection for which all humans strive. It is a new "reign of reason and justice"; a new order of harmony and cooperation.[27] However, redemption is a state "uncomfortably like suspended animation."[28] Since guilt is "endemic" to the nature of humans and the hierarchy, the dramatistic process becomes a

continuous cycle of human acts of cooperation and conflict symbolized by language and motivated by the need for a perfect order in an imperfect world.[29]

Consequently, the interrelationships of (1) hierarchy, (2) acceptance and rejection, and (3) guilt, purification, and redemption not only explain the dramatistic process in society, but serve as a basis for understanding the motivation of human conduct. This study concentrates on the core of the dramatistic process--order: how it is maintained in one hierarchy and achieved in another.

Order and the Firemen in Fahrenheit 451

In Bradbury's world of the future, it is forbidden to own or read books because they cause disorder in an orderly society. Enforcers of the law are firemen whose sole responsibility is the destruction of books by fire at 451 degrees Fahrenheit. The nature and maintenance of order in Bradbury's fictitious society are central to the novel's plot and this study.

F451 is the story of Guy Montag, a fireman, who begins to question the rationale of book burning after a chance meeting with two members of the underground. These dissenters arouse Montag's interest with their reverence for the written word and their undaunted efforts to preserve books. When Montag's curiosity provokes him to steal a book rather than burn it, his guilt so overwhelms him that he cannot report to work. His superior officer, Captain Beatty, who is accustomed to the occasional errors of firemen, arrives unexpectedly at Montag's home. The captain insists that the best remedy for Montag's illness is knowledge of his profession's history. Thus, Beatty proceeds to clarify the role of books, book burning, and firemen in the past and present.

Beatty's lecture provides the text for understanding order in F451. In one sense, this rhetoric operates as an act of purification to resolve Montag's guilt and permit his reaffirmation of the hierarchy. In addition, and more central to the study, Beatty's discourse centers on the three forces that agitated the former social order and established the present one. The former social order, founded on the hierarchical principles of equality, free speech, and the pursuit of happiness, began its decline in the twentieth century. During this time the forces of technology, mass exploitation, and minority pressure worked in unison to revolutionize the world.

Technology and mass exploitation are the initial topics of Beatty's lecture. The technological advances of the twentieth century in printing, photography, and sound gave everything a sense of mass. The more mass, the simpler things became. Books which once appealed to a select audience were "leveled down to a sort of paste-pudding norm" (p. 58). Digests, tabloids, and political issues reduced to one sentence functioned as popular sources of knowledge. While exploiters bombarded the mass population with information that was intelligible and accessible to all, technologists devised new ways to make life simpler and more pleasurable for all. From the perspective of the mass population, the avoidance of "unnecessary time-wasting thought" (p. 59) appeared to enhance rather than violate the hierarchical principles. There was more time for the immediate, the popular, and the pleasurable.

Minority pressure, the third force, challenged the negative influence of technology and mass exploitation. As the book market expanded, the number of minorities offended by controversial content, even in abridgments, increased. Beatty alleges that the "the bigger the population, the more minorities; the bigger your market, the less you handle controversy" (p. 61). Controversy caused displeasure and displeasure caused disorder in society. Minorities were successful in faulting the authors and publishers for the misrepresentation and evil content of books. These sins violated and weakened the principles of equality and the pursuit of happiness. The guilt of the authors and publishers was purified through two self-punishing acts of mortification. First, most authors abandoned their careers to avoid the pressures from "dog lovers, cat lovers, doctors, lawyers, merchants, chiefs, the Mormons, Baptists, Unitarians,

second-generation Chinese, Swedes, Italians, Germans, Texans, Brooklynites, Irishmen, and people from Oregon or Mexico" (p. 61). Second, the authors and publishers who remained in business cleansed the content of their products by censorship. Eventually, books stopped selling because of their "dishwater" (p. 61) subject matter and the mass population stopped reading books of its own accord. The purification process became the undoing of the guilty parties and their product.

Unfortunately, the self-punishing acts of mortification by the authors and publishers were insufficient means of redeeming guilt in society. The same forces which worked in unison to assure equality and the pursuit of happiness had laid the foundation for a new order void of free speech. The cycle of guilt continued because the real vehicle of transgression, the true threat to equality and the pursuit of happiness, had yet to be sacrificed. The key to redemption was found in the banning of all books. They became the victims for alleviating the guilt in society. Books represented the public's fear of inferiority and conflicting thought, both of which caused inequality and unhappiness.

Beatty describes the establishment of the alternative hierarchy as inevitable: "What more easily explained and natural?" (p. 62). Although books stopped selling, not all people stopped reading. A small group of citizens, the "intellectuals" (p. 62), continued to read the available full-length books and to promote theoretical discussions. Well-read citizens, with their "unfamiliar" knowledge (p. 62) and "conflicting" thought (p. 66), created guilt in the general public that could not be controlled by the mere censorship of the content of books. Beatty explains why the burning of books was necessary: "We must all be alike. . . everyone made equal. Each man the image of every other; then all are happy, for there are no mountains to make them cower, to judge themselves against. So! A book is a loaded gun in the house next door. Burn it. Take the shot from the weapon. Breach man's mind" (p. 62).

After houses were completely fireproofed, there was no longer any need of firemen for the old purposes. They were appointed by the government as "custodians of peace of mind, the focus of the understandable and rightful dread of being inferior" (p. 62). Firemen were "the official censors, judges, and executors" (p. 63) who provided a protective barrier against books. Beatty refers to himself and Montag as the "Happiness Boys" (p. 66). They were responsible for destroying objects of unhappiness; books represented the human guilt of free speech. The "bright" and "clean" (p. 64) purification process of fire consumed a sacrificial scapegoat that symbolized the sins of humans frustrated by technology, mass exploitation, and minority pressure. "Thanks to them," Beatty remarks, "you can stay happy all the time" (p. 61).

The state of redemption was complete. A new hierarchy was established in which the "pleasures" and "titillations" (p. 63) of non-thinking jobs, shallow entertainment, and super-sports, assured the happiness of society. These forms of pleasure made all people feel equal because all people had equal access to the same things. Three-dimensional televisions "crammed" the human "full of non-combustible data" (p. 65). Society was so "stuffed with facts that it felt absolutely brilliant with information" (p. 65). Facts, such as the names of popular songs and state capitols, provided a type of order that gave people a "sense of thinking, a sense of motion without moving" (p. 65).

The irony of this order is that even firemen like Beatty, who realized the motives behind their strategy of book burning, preferred the role of censor. Beatty concludes by revealing the reasons for his preference:

> I've had to read a few in my time, to know what I was about, and the books say nothing! Nothing you can teach or believe. They're about nonexistent people, figments of imagination, if they're fiction. And if they're nonfiction, it's worse, one professor calling another an idiot, one philosopher screaming down another's gullet. All of them running about putting out the stars and extinguishing the sun. You come away lost. (p. 66.)

Thus, Beatty cites the combined guilt of technology, mass exploitation, and minority pressure as responsible for violating the former order in society. The new order emerged as the guilty purified themselves by engaging in acts of mortification and victimage. When the acts of mortification by the authors and publishers failed to resolve the guilt associated with free speech, mass society turned to the victimage of books. A more appropriate scapegoat could not be found. Books represented the disorder created by free speech. The destruction of books by fire was the sacrificial offering necessary to alleviate the guilt, and ultimately, to maintain order in the new hierarchy. Redemption was a state of happiness controlled by the absence of books (devices of reason) and the presence of continuous and equal pleasure.

Order and Moral Majority, Inc.

In contrast to the firemen in F451 who employ book censorship by fire to maintain order, MM employs book censorship by concerned parents to impose a new order on American society. The most representative text for understanding this new order is the discourse of three national figures: Reverend Jerry Falwall, founder and president of MM, and his colleagues, Mel and Norma Gabler, cofounders of Educational Research Analysts, a review service for textbooks. Beginning with Falwell, his rhetoric reveals the basis for rejecting the current hierarchy of values in America and establishing a new order.

Falwell argues that there is a direct relationship between the "moral decay" in American society and "the military, economic, and political malaise" of our country.[30] He rejects the current hierarchy which accepts abortion, homosexuality, pornography, humanism, and the fractured family; these values have eroded the morality of society and the stability of the nation.[31] Unless amends are made, Falwell is convinced that America will not survive the twentieth century.[32] To rectify the situation, he organized MM in 1979 as the political arm of his electronic church: "The Moral Majority, Inc. was formed to acquaint Americans everywhere with the tragic decline in our nation's morals and to provide leadership in establishing an effective coalition of morally active citizens who are (a) pro-life, (b) pro-family, (c) pro-moral, and (d) pro-American."[33] It is Falwell's conviction that the vast majority of Americans desire a "moral rebirth" of our nation: "I believe that Americans want to see this country come back to basics, back to values, back to biblical morality, back to sensibility, and back to patriotism."[34]

Since 1979 the growth of MM and its influence on American politics have rendered credence to Falwaell's perceptions of the current hierarchy and his visions for the future. The organization boasts a membership of over two million people, including fundamentalists, evangelicals, Roman Catholics, Jews, Mormons, Protestants, and nonreligious Americans who are conservative in their approach to moral, social and political issues.[35] There are seventy thousand ministers in the nation and a chairperson in each state.[36] According to Falwell, his political lobbying group triumphed in the 1980 election:

> The Moral Majority has touched a sensitive nerve in the American people. Many Americans are sick and tired of the way their government has been run. They are tired of being told that their values and beliefs don't matter and that only those values held by government bureaucrats and liberal preachers are worthy of adoption in the area of public policy. Our people are the previously inactive, turned-off voters who believed that who wins an election doesn't matter. The 1980 election showed that people can make a difference.[37]

MM credits its election efforts as contributing to the Reagan victory and the political defeats of liberal candidates in Alaska, Iowa, Oklahoma, Alabama, Idaho, Florida, South Dakota, and Indiana.[38]

Although election analysts claim that MM had no measurable effect in the 1980 elections, Falwell used the appearance of success to mobilize his attack against the forces of evil.[39] From his perspective American voters publicly acknowledged the guilt of the hierarchy at the polls; now, it was his responsibility to unite them in the process of purification. This includes resolving the guilt of Americans as a nation and as individuals through mortification. Falwell's blueprint for mortification is multifaceted, but it is only through the imposition of mortification that the nation can be purified and reborn.

Helping concerned parents to combat advocacy of immorality in school textbooks and library materials is one way of subjecting Americans to the healing penance of Christian political involvement in social and moral issues.[40] To the delight of Falwell, the 1980 election victories reestablished and reemphasized the book censorship phase of his "Clean Up America" campaign.[41] It was founded in 1979 and endorsed by five United States senators (Harry Byrd, Jesse Helms, Gordon Humphrey, Paul Laxalt, and John Warner) and two representatives (George Hansen and Tom Kindness).[42] The censorship of textbooks and library books, which express controversial views about sex, politics, race, and personal behavior, is a major strategy for the reordering of the Hierarchy.[43] Falwell considers books to be significant factors in the development of our society.[44] However, he labels most textbooks used in the public classrooms today as nothing more than "Soviet propaganda."[45] These textbooks express the philosophy of humanism. It places the human, rather than God, at the center of the universe and emphasizes socialization as the major purpose of education.[46] Falwell urges parents to influence textbook selection because the minds of their children are being perverted:

> Basic values such as morality, individualism, respect for our nation's heritage, and the benefits of the free enterprise system have, for the most part, been censored from today's public classroom textbooks. From kindergarten through the total school system, it almost seems as if classroom textbooks are designed to negate what philosophies previously had been taught.[47]

In the interest of children who must be protected from immorality, Falwell clearly believes in the role of book censorship: "For our nation this is a life-and-death struggle and the battle line for this struggle is the textbook."[48] Furthermore, his remarks during the inauguration of the "Clean Up America" campaign leave little doubt that he supports the right of parents to limit or censor textbooks as a major strategy for reversing the moral decay of their children:

> In school textbooks, pornography, obscenity, vulgarity, and profanity are destroying our children's moral values in the guise of 'value clarification' and 'sex education.' Our children are being trained to deny their 200-year heritage. We must rise up in arms to throw out every textbook [that seeks to deny children their American heritage].[49]

A vital partner in Falwell's campaign to cleanse the public schools and libraries of immoral books is the textbook review service originated in 1961 by Mel and Norma Gabler of Longview, Texas. Their organization, Educational Research Analysts, prepares reviews of textbooks that, "by quotation and page reference," make it unnecessary to read a book in order to censor it.[50] The Gablers are known primarily for their influence with the Texas State Board of Education (which supplies the largest contracts for textbooks in America), but they have helped to remove textbooks from classrooms throughout the United States and in Australia.[51] In April 1979 the Gablers announced Falwell's endorsement of their enterprise:

> Dr. Falwell has asked us to supply resource material to alert Americans nationwide about the damage being done by humanistic textbooks. Since even committed Christians do

> not recognize that the textbook situation is desperate, we believe this widespread exposure could be one of God's most powerful instruments to inform the Christian community.[52]

The typical response of the Gablers to an initial request for a book review usually includes the following statements: "UNTIL TEXTBOOKS ARE CHANGED, there is no possibility that crime, violence, VD, and abortion rates will do anything but continue to climb. TEXTBOOKS mold NATIONS because texbooks largely determine HOW a nation votes, WHAT it becomes, and WHERE it goes."[53]

The Gablers offer no substantial evidence for their arguments; nevertheless, their emotional assertion presumes a cause-and-effect link between books and the moral problems in our country. Along with MM, the Gablers have been successful in promoting this argument across the United States. Book censorship has become their joint strategy for achieving redemption or America's moral rebirth. In fact, Falwell makes a valid comparison of the Gablers' success to the potential success of MM if concerned parents mobilize:

> Today . . . more and more parents are beginning to read their children's textbooks and to take more of an interest in what their children are being taught. The Gablers are living proof that ordinary parents, without a specialized education or background of public involvement, can be a potent force in public education.[54]

In sum, the success of the Falwell and Gabler strategy of book censorship depends upon the mobilization of parents who perceive a cause-and-effect relationship between the immorality in society and "immoral content" of textbooks and library materials. The guilt of parents for allowing these transgressions has weakened the hierarchy of values being taught in our schools and the hierarchy of values upon which our nation was founded. Purification includes the mortification process of public acknowledgment and repentance. Joining the ranks of MM represents public acknowledgment of the guilt, while censoring textbooks and library materials affords parents and their children a healing strategy that will lead them one step closer to the moral redemption of America.

A Comparative Analysis

The dramatistic process of Kenneth Burke illustrates that the search for order is a motivating factor in the plot of the novel and in the public discourse of MM. But it is the comparative analysis which follows that demonstrates the implications for free speech when book censorship is employed to maintain or achieve order in society. Given this significance, it remains necessary to compare the two dramatistic perspectives along three dimensions: the imperative of book censorship, the extent of book censorship, and the influence of the book censors.

The Imperative of Book Censorship

The imperative of book censorship for the firemen and MM is made salient by the dramatistic process. Books are perceived as elements of disorder; therefore, censorship is a necessary strategy for order. The firemen burn books to maintain order and MM advocates the censorship of books (sometimes the burning of books) to achieve order. Books are considered weapons of the mind by the firemen and weapons of perversion by MM. In essence, each group would argue that there is a cause-and-effect relationship between books and disorder in society. From the perspective of the firemen, books cause unrest and unhappiness. From the perspective of MM, books cause immoral behavior, which in turn destroys the foundation of America. Thus, censorship is an inevitable and imperative strategy for order.

The Extent of Book Censorship

In the science-fiction world of F451, books are absolute forms of guilt, regardless of their content. All members of society are prohibited from reading books because all books generate free thought and free speech. Those readers of books who make others unhappy with conflicting thought and theory are in violation of the hierarchy. Book censorship purifies the world of inferiority, unhapiness, and unrest. Book censorship by fire is what Beatty refers to as the "bright" and "clean" (p. 64) spectacle that consumes the weapon in order to purge the guilty. This act of victimage by fire heightens the power of the spectacle and is in direct proportion to the degree of guilt incurred by reading books.

With MM, the extent of book censorship is limited. When the values of life, family, morality, and America are upheld in a textbook or library book, it is considered suitable reading. When the sins of abortion, homosexuality, humanism, pornography, and the fractured family are sanctioned in a textbook or library book, it becomes a target for censorship. While the entire country is suffering from moral decay, the nation's children are the primary victims. The burden of guilt rests on parents who have "endorsed what should have been opposed."[55] In turn, the unhappy and guilt-ridden parents blame the educational system. Public schools and libraries are convenient and vulnerable scapegoats for attacks by individuals who must purge their guilt not only through public acknowledgment and repentance (the acts of mortification), but through a powerful vehicle (victimage of public schools and libraries) that equals the degree of moral decay in society.

The Influence of the Book Censors

The firemen are members of the decision-making establishment that controls the society of the future.[56] They are government-appointed censors who support and protect the civic harmony of the hierarchy. In this regard, firemen perform a ritual of purification by fire whenever individuals violate the principles of the social order through the illegal practice of reading books. Inasmuch as the mass population stopped reading books of its own accord to attain happiness, the firemen are rarely necessary. They hold a place of respect and power in the hierarchy because when citizens do sound alarm about books, the firemen can be relied upon to enforce the law and safeguard the happiness of society.

On the other hand, MM is a type of agitative group that rejects the morals of the decision-making establishment in the United States.[57] The strength of MM rests on its ability to operate as an agent of political and spiritual change within the system. To this end MM is a registered political organization which benefits from a computerized mailing list of over 400,000 right-wing supporters.[58] The Arbitron Company estimated the audience of Falwell's television program, "The Old Time Gospel Hour," to be 1.5 million in 1980.[59] Most researchers predict that the first half of the eighties will be critical in determining if MM can develop a real base of political power; yet, few can deny that 1977 marked the entrance of MM as a discernible force in the politcal and religious arenas.[60]

Perhaps this perception of influence, particularly in terms of the campaign against immorality in textbooks and library materials, can be attributed not only to the visibility generated through mass communication, but also to what social psychologists, Yankelovich and Hadden, have called the uneasiness of adults about the moral climate's effect on their children.[61] This discontent is shared by millions of Americans, not only members of MM.[62] The state and local chapters of Falwell's organization draw support from other right-wing associations, fundamentalist groups, and guilt-ridden parents who align themselves with the issue rather than the full extent of the program.[63] The joint efforts of these censors have resulted in a vocal and visible coalition to save the children of America from an uncertain and immoral future. During a time of economic setbacks and moral permissiveness, the conditions in the hierarchy are favorable for MM to promote its strategy of book censorship by enlisting grass-roots suport to directly confront the school and library boards. The real influence of MM is in its potential to harness the power necessary for the

imposition of a new order in society.

The Implication of Book Censorship for Free Speech

Beyond the similarities and differences between the firemen and MM made apparent by the dramatistic process lies the implications of this parallel for free speech. Underlying the novel's plot is a serious conviction about the future if minority pressure regarding book censorship prevails. To argue that such a future is imminent would be to rave like a mad rhetorical critic and be ignored. To argue that such a future is possible is to assess the rhetorical significance of the analysis and confront the advocates of free speech with the magnitude of the problem.

Whether depicted in F451 or practiced in the decade of the eighties, book censorship must be assessed as a strategy contrary to the Burkeian definition of order (reason and justice) and contrary to the social order of a democracy. The order described in F451 suggests a society manipulated by a "sense of motion without moving" (p. 63). Bradbury's imaginary citizens are "rotten with imperfection."[64] They share no desire to strive for redemption through meaningful language because they have learned from the past that the thoughts found in books cause unhappiness and conflict among humans. Their redemption is a state of happiness and peace of mind which tolerates information control to create equality, homogeneity of opinion to suppress free speech, and uniform conduct to restrict individuality. This type of order undermines reason and justice and the very foundation of a democracy.

The same is true of the book censorship incited by MM. To achieve redemption MM encourages parents to limit the opportunities for their children to make wrong or immoral choices. In spite of its noble aims, the strategy of book censorship precludes free choice and free speech. When spokespersons like Falwell and the Gablers dictate the standards of appropriate and inappropriate textbooks for children based on "the word of God," the threat to open inquiry in a democratic society cannot be easily dismissed. This type of repression has the potential to become the blueprint for a social order similar to that of F451--humans "crammed full of noncombustible data" (p. 65).

The magnitude of book censorship as a threat to free speech should not be underestimated. The results of a 1980 nationwide survey sponsored by the American Library Association, the Association of American Publishers, and the Association for Supervision and Curriculum Development indicate the growing trend towards the censorship of books: "Nearly 2,000 responses from 7,500 public school administrators and librarians point to the involvement of more than 20 percent of the nation's school districts and 30 percent of its school libraries in challenges to literary books and textbooks."[65] Edward B. Jenkinson, former chairperson of the National Council of Teachers of English Committee Against Censorship, notes that "the scope of censorship constitutes a battle over virtually everything--over who will control the minds of our children."[66] A similar concern is expressed by the American Civil Liberties Union. This group warns that if the book censorship campaign remains unrestrained, an outspoken minority will be able to limit other people's choices of what to read.[67]

To misunderstand the implications of book censorship as a strategy for the maintenance or achievement of order is to make a serious mistake. The book censorship encouraged by MM is a subtle and powerful menace to free speech. Until more Americans perceive this force as destructive, successful attempts at book censorship will continue to promote what United States District Court Judge Joseph Tauro characterizes as a "poison of mindless orthodoxy."[68]

Endnotes

[1]Ray Bradbury, Fahrenheit 451 (1953); rpt.(New York: Ballantine-Random House, 1979); Afterword, pp. 181-84. Hereafter, the title will be cited as F451 and references will be in parentheses in the text.

Bradbury defines the "minorities who burn books" in the following excerpt from the "Afterword": "Every minority, be it Baptist/Unitarian, Irish/Italian/Octogenarian/Zen Buddhist, Zionist/Seventh-day Adventist, Women's Lib/Republican, Mattachine/Four Square Gospel, feels it has the will, the right, the duty to douse the kerosene, light the fuse. Every dimwit editor who sees himself as the source of all dreary blanc-mange plain porridge unleavened literature, licks his guillotine and eyes the neck of any author who dares to speak above a whisper or write above a nursery rhyme" (p. 182). The definition is assimilated in the novel and developed in a subsequent section of this essay, entitled "Order and the Firemen in Fahrenheit 451."

[2]For case studies on the tactics of book censors such as protests in Island Trees, New York, bombings and assaults in Kanawha County, West Virginia, threats to teachers in North Dakota, Nebraska, and Rhode Island, boycotts in Missouri and Maine, displacement and/or dismemberment of books in Indiana and Pennsylvania, and restricted access to books in the libraries of Texas and Louisiana, see Edward B. Jenkinson, Censors in the Classroom (Carbondale: Southern Illinois University Press, 1979); Stephen Arons, "The Crusade to Ban Books," Saturday Review, June 1981, pp. 17-19; and monthly issues of Newsletter on Intellectual Freedom, 1978-present.

[3]The major fundamentalist organizations include Moral Majority, Inc., Christian Voice, the Religious Roundtable, the National Christian Action Coalition, the Conservative Caucus, the Committee for Survival of a Free Congress, the Heritage Foundation, and the John Birch Society. Anti-feminists are represented by Phyllis Schafly, founder of the Eagle Forum, and the publication, The Phyllis Schafly Report. Feminist censors are represented by the National Organization for Women. Individual parents can turn to over eight hundred local, state, and national organizations which seek to censor books; see Edward B. Jenkinson, "Censorship in the Schools," The School Administrator, 15 (March 1982), 1.

[4]See, for example, James E. Davis, ed., Preface, Dealing with Censorship (Urbana, Illinois: National Council of Teachers of English, 1979), pp. ix-xii; Jenkinson, Censors in the Classroom, pp. 156-63; and J. Charles Park, "Teachers, Politics, and Public Education: A Review of Right-Wing Pressures Against Public Schooling in America," Phi Delta Kappan, 61 (1980), 608-15.

[5]These viewpoints reflect the concerns of censors across the nation, particularly the fundamentalist censors in ft. # 3. For further discussion see Stan Chatkins, "Censorship: Another Voice," Moral Majority Report, 24 May 1982, p. 11; and, L.B. Woods, "Is Academic Freedom Dead in Public Schools?" Phi Delta Kappan, 61 (1979), 104-06.

The list of objectionable books is limitless. For an index of 145 objectionable titles from A Farewell to Arms to Ulysses, see Lee Burress, "A Brief Report of the 1977 NCTE Censorship Survey," in Davis, pp. 14-47. The most complete and current list of objectionable books, classified by author and coded by the reasons for the objections, can be found in Caution! A List of Books Some People Consider Dangerous (New York: American Book Sellers Association, 1982).

[6]Michelle Marder Kamhi, "Censorship vs. Selection--Choosing the Books Our Children Shall Read," Educational Leadership, 39 (1981), 211; Dorothy Massie, "Censorship in the Schools: Something Old and Something New," Today's Education, 69 (November-December 1980), 56GE; Herbert Mitgang, "Book Censorship Increasing," The Fort Wayne Journal-Gazette, 12 September 1982, p. 10D; and "Office of Intellectual Freedom's Krug Claims Censorship Issues Have Increased Since the November Election," School Library Journal, 27 (January 1981), 11.

[7]Hereafter, Moral Majority, Inc. will be cited as MM.

[8]"The Shoe Fits on the Other Foot," Newsletter on Intellectual Freedom, 30 (January 1981), 8.

[9]Woods, p. 104.

[10]Kenneth Burke, "Definition of Man," The Hudson Review, 16 (1963-64), 507; rpt. in Kenneth Burke, Language as Symbolic Action (Berkeley: University of California Press, 1966), p. 16.

[11]Kenneth Burke, Permanence and Change (1954; rpt. Indianapolis: Bobbs-Merrill, 1965), p. 276.

[12]Burke, Permanence and Change, p. 276.

[13]Burke, Permanence and Change, p. 274. For Burke's first reference to the term "dramatism" in discussing human conduct, see A Grammar of Motives (New York: Prentice, 1945); rpt. A Grammar of Motives and A Rhetoric of Motives (Cleveland: World Publishing, 1962), pp. xvii-xxv. Burke summarizes the evolution of "dramatism" in Dramatism and Development (Barre, Massachusetts: Clark University Press, 1972).

[14]Bernard L. Brock, "Rhetorical Criticism: A Burkeian Approach," in Methods of Rhetorical Criticism, ed. Bernard L. Brock and Robert C. Scott, 2nd ed. (Detroit: Wayne State University Press, 1980), p. 349.

[15]Burke, "Definition of Man," pp. 15-16.

[16]Burke, "Definition of Man," pp. 16-20. Other works by Burke on reason and justice are Attitudes Toward History (Boston: Beacon, 1961), pp. 341-42; and "Postscripts on the Negative," Quarterly Journal of Speech, 39 (1953), 211-12; rpt. in Language as Symbolic Action, pp. 440-41.

[17]Burke, Permanence and Change, p. 283.

[18]Brock, p. 350.

[19]Brock, p. 350.

[20]Kenneth Burke, The Rhetoric of Religion (1961; rpt. Berkeley: University of California Press, 1970), pp. 4-5.

[21]Brock, p. 350.

[22]Brock, p. 350.

[23]Kenneth Burke, A Rhetoric of Motives (New York: Prentice, 1950); rpt. A Grammar of Motives and A Rhetoric of Motives, p. 665; and Permanence and Change, p. 288.

[24]"This leads to 'mystification' that cloaks the state of division." Burke, A Rhetoric of Motives, p. 665. For further discussion of Burkeian hierarchy and mystery, see Brock, pp. 350-51; Barry Brummett, "Burkeian Scapegoating, Mortification, and Transcendence in Presidential Rhetoric," Central States Speech Journal, 32 (1981), 255; and Leland Griffin, "A Dramatistic Theory of the Rhetoric of Movements," in Critical Responses to Kenneth Burke, 1924-1966, ed. William H. Rueckert (Minneapolis: University of Minnesota Press, 1969), pp. 458-60.

[25]Brock, p. 351.

[26]Brock, p. 351.

[27]Burke, Attitudes Toward History, pp. 341-42; and Language as Symbolic Action, pp. 440-41.

[28]Burke, A Rhetoric of Motives, p. 818.

[29]Alvin C. Kibel, "Guilt and History," in Rueckert, p. 422.

[30]Jerry Falwell, Listen, America! (New York: Bantam-Doubleday, 1980), pp. 6-8.

[31]Falwell describes these values as "the five major problems that have political consequences, political implications, that moral Americans need to be ready to face." Listen, America! p. 221.

[32]Falwell, p. 232.

[33]Falwell, p. 227.

[34]Falwell, p. 17.

[35]What is the Moral Majority? (Washington, D.C.: Moral Majority, Inc., n.d.); and Jerry Falwell, "The Maligned Moral Majority," Newsweek, 21 September 1981, p. 17.

[36]What is the Moral Majority?; and James Mann and Sarah Peterson, "Preachers in Politics: Decisive Force in '80?" U.S. News & World Report, 15 September 1980, p. 25. For a current discussion and analysis by two scholars of sociology and religious communication who explain (1) how the audience data were verified by the Arbitron Company and (2) why Falwell exercises the "ministerial license for exaggeration," see Jeffrey K. Hadden and Charles E. Swann, Prime Time Preachers (Reading, Massachusetts: Addison-Wesley, 1981), pp. 47-67 and 159-65.

[37]Falwell, "The Maligned Moral Majority," p. 17.

[38]Jim Meyers, "Will the Majority Rule?" The Rochester (N.Y.) Democrat & Chronicle, 14 December 1980, n.p.

[39]Hadden and Swann, pp. 161-65; and Seymour M. Lipset and Earl Raab, "The Election and the Evangelicals," Commentary, 71 (March 1981), 25-31.

[40]Falwell, Listen, America! p. 227.

[41]Edward B. Jenkinson, "Forty Targets of the Textbooks Protestors," Indiana Speech Journal, 16 (April 1981), 10; and James Mann, "Books and TV--New Targets of Religious Right," U.S. News & World Report, 8 June 1981, p. 45.

[42]Jenkinson, "Forty Targets," p. 10.

[43]Mann, "Books and TV," p. 45.

[44]Falwell, Listen, America! p. 180.

[45]Jerry Falwell, "Clean Up America," speech delivered in Washington, D.C., April 1979, as quoted in Jenkinson, "Forty Targets," p. 10.

[46]Falwell, Listen, America! pp. 178-79. See the response of the Commission to Defend Humanism in Maxine Negri, "The Moral Majority vs. Humanism," Humanist, 41 (March-April 1981), 4-5.

[47]Falwell, Listen, America! p. 179.

[48]Jerry Falwell, "Textbooks in Public Schools: A Disgrace and Concern to America," Thomas Road Family Journal-Champion for Truth, 4 May 1979, p. 8.

[49]Falwell, "Clean Up America," p. 10.

[50]Arons, "The Crusade to Ban Books," p. 19.

[51]Jenkinson, Censors in the Classroom, p. 115.

[52]Mel Gabler and Norma Gabler, Educational Research Analysts Newsletter, April 1979.

[53]Mimeographed sheet distributed by the Gablers entitled, "For Your Consideration," as quoted in Jenkinson, Censors in the Classroom, p. 173.

[54]Jerry Falwell, ed. The Fundamentalist Phenomenon (New York: Doubleday-Galilee, 1981), p. 199.

[55]Falwell, Listen, America! p. 222.

[56]In F451 the government is the decision-making establishment. Social organizations, which have structure, goal orientation, and the power to legislate policies as well as enforce laws, are referred to as decision-making establishments in John W. Bowers and Donovan J. Ochs, The Rhetoric of Agitation and Control (Reading, Massachusetts: Addison-Wesley, 1971), pp. 4-15.

[57]Here, "agitative" refers to that "style of persuasion characterized by highly emotional arguments and alleged violation of moral principles." The definition is found in the Bowers and Ochs text, p. 3, as an example of a traditional definition that is problematic and limited in its usefulness. This author believes the definition accurately describes the rhetoric of agitators in the eighties, such as MM, who combine religion and politics. For further discussion, see Janet M. Roncelli, "The Rhetorical Resistance of the American Library Association to the Book Censorship Campaign of Moral Majority, Inc.," paper presented at the annual meeting of the Michigan Speech Association, Traverse City, Michigan, 9 October 1981.

[58]Hadden and Swann, p. 165.

[59]For a discussion of the Arbitron Company's audience data collection of MM, see Hadden and Swann, pp. 47-67.

[60]For a synopsis of the data from a variety of sources regarding the future impact of MM, see Hadden and Swann, p. 166; Bill Keller, "Evangelical Conservatives Move From Pews to Polls, But Can They Sway Congress?" and "Christian Vote Ratings: Study in Absolutes," Congressional Quarterly, 38 (1980), pp. 2627-34; and John Mashek, Joseph Benham, and James Mann, "As Moral Majority Girds for '82 Elections," U.S. News & World Report, 21 June 1982, pp. 43-44.

[61]See comparable viewpoints in Daniel Yankelovich, "Stepchildren of the Moral Majority," Psychology Today, November 1981, pp. 5-10; and Hadden and Swann, pp. 159-97.

[62]Yankelovich, pp. 5-10; and Hadden and Swann, pp. 159-97.

[63]Yankelovich, p. 10.

[64]"Man is rotten with 'perfection.'" Burke, "Definition of Man," p. 16.

[65]For a first-hand analysis of the survey by the principal author of the report, see Kamhi, pp. 211-15.

[66]Edward B. Jenkinson as quoted in "Sunshine for Censorship," Newsletter on Intellectual Freedom, 28 (September 1979), 116.

[67]Mann, "Books and TV," p. 45.

[68]"New Court Decisions," Unites States Law Week, 1 August 1978, p. 204.

JUSTICE BRENNAN AND THE FIRST AMENDMENT, 1956-1984

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Conventional wisdom in the civil liberties community usually identifies former U.S. Supreme Court Justices Hugo Black and William O. Douglas as the judicial patron saints of the First Amendment. No disrespect to those historic giants is intended by this paper, which proposes that there is another who rightly deserves the championship title in this arena. Justice Black was indeed a vigorous, if not always consistent[1] proponent of the view that the Founding Fathers meant absolutely and literally what they said when they wrote that Congress shall make no law abridging freedom of speech and press. And Justice Douglas's record service of thirty-six years on the Supreme Court bench was indeed consistent, if not always entirely lucid,[2] in supporting First Amendment freedoms. But the halo which surrounds dead heroes such as these must not be allowed to obscure the work of the living, and when a final reckoning is made I believe it will be found that a Roman Catholic Democrat from New Jersey, William Brennan, Jr., appointed to the U.S. Supreme Court by a WASP Republican from Kansas, Dwight D. Eisenhower, has contributed more to the shaping and fortifying of First Amendment law than Justices Black and Douglas combined.

A review of the Brennan record in First Amendment cases reveals a truly astonishing panoply of votes and opinions. In an era when freedom of speech and press were subjected to some of their severest tests, and the nature of First Amendment protections was spelled out more extensively than ever before in our history, Justice Brennan has manned the barricades with profound commitment, incisive logic, and eloquent style.

During his first half-dozen years on the bench, from 1956-1961, he was the junior member of that famous quartet of dissenters--Warren, Black, Douglas, and Brennan--who objected to a balancing of government interests against the right not to speak which found Lloyd Barenblatt,[3] Willard Uphaus,[4] Frank Wilkinson,[5] and Carl Braden[6] in contempt of government authority for not answering the questions of Communist hunters, and which held that the Communist Party must register with the Subversive Activities Control Board.[7] A survey of his other votes over the years in First Amendment cases where he wrote no opinions himself--and we postpone only briefly our consideration of the much more impressive array of decisions for which he did write opinions--shows him invariably joining with the majority when the majority upheld First Amendment claims against competing interests, consistently joining in dissent when the majority rejected First Amendment claims, and carefully joining in the judgment only, withholding his concurrence from the majority's opinion, on occasions when the majority ended up on the right side but with a garbled rationale. Let us quickly identify the cases in each of these categories so that we may then pass on to the weightier matter of his opinions.

I have found but four free-speech cases in which Justice Brennan voted with the majority but wrote no opinion, all dealing with the issue of flag misuse or desecration and all supporting the constitutional rights of the flag displayers.[8] The number of items in this category is such a small one because, as we shall soon see, the Brennan name appears again and again on majority, plurality, or concurring opinions where a majority came down on the side of the First Amendment.

The list of Justice Brennan's dissents without opinion in First Amendment cases is as long as his dissents with opinion are powerful. The litany of the former begins in 1966, extends through 1982, and includes the following Court decisions:

1966 - Adderley v. Florida, upholding a trespass conviction for a civil rights demonstration on a jailhouse grounds.[9]

1967 - Walker v. Birmingham, upholding a contempt conviction of civil rights demonstrators marching in violation of an ex parte injunction.[10]

1971 - Law Student Civil Rights Council v. Wadmond, upholding the right of a bar association to require answers to questions about the political beliefs of applicants to the bar.[11]

1972 - Lloyd v. Tanner, upholding the right of a private shopping center to exclude political leafleteers.[12]

Laird v. Tatum, upholding the dismissal of a case challenging the surveillance of political activities by the Army.[13]

Branzburg v. Hayes, rejecting the claim of a right of reporters to refuse to disclose their confidential sources of information.[14]

California v. LaRue, upholding the authority of the state to ban topless dancing where alcoholic beverages are sold.[15]

1973 - U.S. Civil Service Commission v. National Association of Letter Carriers,[16] and Broadrick v. Oklahoma,[17] sustaining restrictions on political activities by government employees.

1974 - Parker v. Levy, sustaining the court-martial conviction of an army officer for his criticisms of the Vietnam War.[18]

1975 - Farrell v. Iowa, refusing to grant review to a state conviction for the public protest burning of an American flag.[19]

1976 - Time v. Firestone, ruling that Ms. Firestone was not a public figure for the purposes of a libel suit about her much publicized divorce from an heir of the Firestone Tire and Rubber Company.[20]

Hudgens v. N.L.R.B., rejecting a previous view that shopping centers are like company towns for the purpose of the exercise of First Amendment rights.[21]

Young v. American Mini Theatres, upholding the right of a city to zone against so-called "adult" theatres and bookstores.[22]

1977 - Jones v. North Carolina Prisoners Union, upholding the authority of prison officials to prohibit the solicitation of prisoners to join a prisoners' union.[23]

Zacchini v. Scripps Howard Broadcasting Company, upholding the right to sue a television station for invasion of privacy as the result of its broadcasting a film clip on the local news of a county fair human cannon ball act.[24]

1978 - Houchins v. KQED, denying a television station a right of access to a prison.[25]

1980 - Snepp v. U.S., confiscating the royalties of a book about the C.I.A. which had been published in violation of the author's contractual obligation to submit the manuscript to the C.I.A. for prior censorship.[26]

1981 - Haig v. Agee, upholding the revocation of a passport for naming the names of C.I.A. agents.[27]

1982 - F.B.I. v. Abramson, holding that F.B.I. investigative files which are exempt from disclosure under the Freedom of Information Act do not

lose that exemption even when summarized and transmitted to the Nixon White House for other than law enforcement purposes.[28]

Finally, on two relatively recent occasions, in Central Hudson Gas and Electric Corporation v. Public Service Commission of New York in 1980,[29] and in Metromedia, Inc. v. City of San Diego in 1981,[30] Justice Brennan apparently found the majority and plurality analyses, respectively, of the relationship of the First Amendment to commercial speech so inadequate that he could only vote with their final judgment that the speech at issue was constitutionally protected, but not with their supporting rationale.

Let us now turn to the more important part of this review--a survey of the written opinions of Justice Brennan on freedom of speech and press. We will deal first with the opinions in which he has spoken for a majority of the Court, next with three plurality and three concurring opinions with significant implications, and then with a set of cogent and ringing dissents. Finally we will examine one wart on his otherwise unblemished record.

When Justice Brennan has spoken for a majority of the Supreme Court he has more often than not coined phrases that have become among the most quoted of free speech precedents. Pre-eminent among these is his 1964 statement in New York Times v. Sullivan that "we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open."[31] But almost equally prominent among his quotable principles are his 1963 Bantam Books v. Sullivan pronouncement that "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity,"[32] and his 1965 observation in Dombrowski v. Pfister that the state had engaged in actions which had a "chilling effect upon the exercise of First Amendment rights."[33]

It was also Justice Brennan who, in 1972, announced that prohibitions against so-called "fighting words" must be limited only to words which "have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed,"[34] and who, in 1982, declared that for a court to deny access to the press and public to a criminal trial "it must be shown that the denial is necessitated by a compelling government interest and is narrowly tailored to serve that interest."[35]

In three plurality opinions Justice Brennan has attempted, once without success and twice with the ultimate fate of his view yet to be determined, to push forward the protections of the First Amendment to new frontiers. In 1971 he argued that, in suits for libel, private persons who have been involved in matters of public or general interest, whether voluntarily or involuntarily, should be held to the same heavy burden of proving knowing or reckless falsehood as public figures.[36] Three years later that view was explicitly rejected by the Court,[37] over a Brennan dissent,[38] although it continues to be urged by critics of the present law of defamation.[39]

In 1976, Justice Brennan, speaking for a plurality of three, concluded that dismissals of public employees for patronage reasons violated the constitutional protections of political belief and association[40] --an opinion which, though failing to command a majority, has never been disavowed by the Court and, on the contrary, has encouraged at least one lower federal court to take the further step of holding that even patronage hiring of non-policy-making personnel violates the First Amendment.[41]

Most recently, at the end of the Supreme Court's term in 1982, Justice Brennan wrote for a four-person plurality on the vexing and ever-growing problem of the censorship of literature in the public schools. As he saw it, "the First Amendment rights of students may be directly and sharply implicated by the removal of books from the shelves of a school library."[42] He argued that:

> the right to receive ideas follows ineluctably from the sender's First Amendment right to send them . . . . More importantly, the right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom . . . .
>
> Our Constitution does not permit the official suppression of ideas. Thus whether petitioners' removal of books from their school's library denied respondents their First Amendment rights depends upon the motivation behind petitioners' actions.[43]

With the help of Justice White's fifth vote, although not his agreement with the Brennan opinion, this case, which had originally been dismissed by the district court judge, was sent back to the lower court for a trial. The school board, however, gave up the fight at that point and returned the purged books to their library. Thus, whether Justice Brennan's views about the extent of a school board's permissible discretion in the removal of library books will prevail in the long run must await another case, not to mention a resolution of the much broader and even more difficult questions of the First Amendment's relationship to the initial selection of school library materials or of school textbooks.

Roughly paralleling the span of years in which the foregoing plurality opinions were written came a series of three concurring opinions expressing Justice Brennan's less fearful commitment than that of most of his colleagues to an unrestrained marketplace of ideas. Concurring in 1971 with the judgment that the Pentagon Papers should be allowed to be published he said:

> The First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result . . . . only governmental allegation and proof that publication must inevitably, directly and immediately cause the occurence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order . . . every restraint issued in this case, whatever its form, has violated the First Amendment.[44]

Agreeing in 1976 that a trial judge's gag order on the press was an unacceptable way of protecting a fair trial in the particular circumstances of that case, Justice Brennan reached for broader ground:

> I unreservedly agree with Mr. Justice Black that "free speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them" . . . . But I would reject the notion that a choice is necessary . . . . judges possess adequate tools short of injunctions against reporting for relieving that tension.[45]

And in 1980, joining in a judgment which found a First Amendment right of access to the courtroom for press and public, Justice Brennan elaborated:

> the First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a structural role to play in securing and fostering our republican system of self-government . . . . Implicit in this structural role is not only "the principle that debate on public

> issues should be uninhibited, robust, and wide-open" . . . but the antecedent assumption that valuable public debate - as well as other civic behavior - must be informed. The structural model links the First Amendment to that process of communication necessary for a democracy to survive, and thus entails solicitude not only for communication itself, but for the indispensable conditions of meaningful communication.[46]

Although we are fortunate that Justice Brennan has so often had the opportunity to speak about freedom of speech and press as one of the prevailing members of the Supreme Court, his contributions to the maintenance of a clear and sensible understanding of the First Amendment, as expressed in his dissenting opinions, may prove to be of equally enduring value. Four such dissents are particularly notable.

In 1973 he dissented from a decision of the Court which held that broadcasters who refused to accept editorial advertising, while accepting commercial ads, were in violation of neither the Federal Communications Act nor the First Amendment. He objected to this practice as follows:

> Our legal system reflects a belief that truth is best illuminated by a collision of genuine advocates. Under the Fairness Doctrine, however, accompanied by an absolute ban on editorial advertising, the public is compelled to rely exclusively on the "journalistic discretion" of broadcasters who serve in theory as surrogate spokesmen for all sides of all issues. This separation of the advocate from the expression of his views can serve only to diminish the effectiveness of that expression . . . . as the system now operates, any person wishing to market a particular brand of beer, soap, toothpaste, or deodorant has direct, personal and instantaneous access to the electronic media. He can present his own message, in his own words, in any format he selects and at a time of his own choosing. Yet a similar individual seeking to discuss war, peace, pollution, or the suffering of the poor is denied this right to speak.[47]

The following year, as a result of one of Justice Douglas's lapses from lucidity, the Court voted 5-4 to uphold a similar practice of the Shaker Heights, Ohio, rapid transit system, rejecting political display advertisements but accepting all others.[48] Fortunately Justice Douglas gave the majority only his vote, writing a separate concurring opinion about the rights of captive public transit users to be free from the bombardment of political (though apparently not commercial) ads.[49] Thus the garbled and baffling discussion of public forum law written by Justice Blackmun for the other four justices in the majority was happily only a plurality opinion,[50] and one which Justice Brennan's dissent dissects with the precision of a skilled surgeon.[51] Indeed it would be difficult to find a clearer and more cogent analysis of public forum principles than in this Brennan dissenting opinion.

Again in 1976, dissenting from a decision which upheld the right of commanding officers of otherwise open military bases to exclude political speakers from their turf, Justice Brennan incisively reiterated the First Amendment principles which should govern such territory,[52] pointedly commenting that "The military certainly could retain the right to exclude civilian traffic, but it could not choose freely to admit all such traffic save for the traffic in ideas."[53]

But perhaps the most refreshing, sane, and desperately needed of his dissents came in 1978 in vehement protest against what is surely the Supreme

Court's most inexplicable departure from First Amendment tenets in recent years. Said Justice Brennan of the Court's affirmation of an F.C.C. disciplinary ruling for the broadcast of George Carlin's famous seven dirty words:

> I find the Court's misapplication of fundamental First Amendment principles so patent, and its attempt to impose its notions of propriety on the whole of the American people so misguided, that I am unable to remain silent . . . .
> As surprising as it may be to individual members of this Court, some parents may actually find Mr. Carlin's unabashed attitude towards the seven "Dirty words" healthy, and deem it desirable to expose their children to the manner in which Mr. Carlin defuses the taboo surrounding the words. Such parents may constitute a minority of the American public, but the absence of great numbers willing to exercise the right to raise their children in this fashion does not alter the right's nature or its existence. Only the Court's regrettable decision does that . . . .
> The idea that the content of a message and its potential impact on any who might receive it can be divorced from the words that are the vehicle for its expression is transparently fallacious. A given word may have a unique capacity to capsule an idea, evoke an emotion, or conjure up an image. Indeed, for those of us who place an appropriately high value on our cherished First Amendment rights, the word "censor" is such a word.[54]

As if to reassure us that no one can be perfect, Justice Brennan has one blemish on his First Amendment record--although he has also gone quite far to redeem himself for it. It was he, it may be recalled, who authored the landmark Roth decision in 1957 which announced for the Court: "We hold that obscenity is not within the area of constitutionally protected speech."[55] Having uttered that principle, however, Justice Brennan did his best in the ensuing years, sometimes succeeding and sometimes not, to hold the line against his more censorious colleagues in defining the obscene.

In 1959, for example, he wrote for a unanimous Court that one cannot be convicted on an obscenity charge without proof of scienter--that the distributor of the material knew what its contents were.[56] In a 1964 plurality opinion he asserted that a work should not be found obscene unless judged by a national standard to be "utterly without redeeming social importance,"[57] and he added, in another plurality opinion two years later, that it must also be "patently offensive."[58]

Finally in 1973, dissenting from the new Nixon-Burger Court's broadened definition of obscenity, Justice Brennan announced that the experience with this issue in the years since Roth had persuaded him that that decision was mistaken and that he now "would hold . . . that at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the 1st and 14th Amendments prohibit the state and federal governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents."[59]

Despite this partial restoration of his credentials as a free speech stalwart, Justice Brennan has yet left us with a flawed legacy regarding sexually oriented material. Still standing as prevailing precedents are his 1966 majority opinion, written over the dissents of Justices Black, Douglas and Stewart, upholding the conviction of Ralph Ginzburg for what was described as the "sordid business of pandering,"[60] and his 1968 majority opinion, again over the dissents of Justices Black and Douglas, affirming a doctrine of

"variable obscenity," which allows a state to use a stricter definition of obscenity when children are the target audience than when the target is adults.[61] And as recently as 1982 he wrote a concurring opinion in New York v. Ferber,[62] carrying Justice Marshall with him and thus providing a unanimous judgment of the Court, upholding a prohibition on the dissemination to anyone of non-obscene material depicting sexual conduct by children under the age of sixteen--a law enacted by the New York state legislature which, interestingly enough, had been found unconstitutional by New York's own highest court. Despite the U.S. Supreme Court's creation in this case of an entirely new category of material--so-called child pornography--that is not protected by the First Amendment (and note that we are talking about its circulation, not its production), Justice Brennan avows that he agrees "with much of what is said in the Court's opinion" and cites as justification for this his "special interest in protecting the well-being" of youth, as enunciated in his "variable obscenity" opinion of 1968.[63] His only caveat is that he would exempt from this newly established unprotected category any material having serious literary, artistic, scientific or medical value,[64] ironically borrowing the very phrase from the Burger Court's 1973 definition of obscentiy from which he had so strongly dissented.

It is unfair in the final reckoning, however, to be too hard on the rare faults of a man who has given us so much that is invaluable and who is so ready to acknowledge his own foibles. Just as he had unabashedly announced his past mistakes and conversion with respect to the law of obscenity in 1973, once again a decade later he has confessed error in another magnificent First Amendment dissent, this time with respect to that other part of the First Amendment dealing with the separation of church and state. On July 5, 1983, by a vote of 6-3, the U.S. Supreme Court overturned a ruling of the U.S. Eighth Circuit Court of Appeals which had found the Nebraska legislature in violation of the establishment of religion clause for its practice of having opening prayers by a chaplain of a single denomination for a period of sixteen years, paid for with the taxpayers' money.[65] Acknowledging what he described as the "furious reaction" that a contrary decision by the Supreme Court would likely have aroused, Justice Brennen concluded that "if the Court were to judge legislative prayer [and here he refers to all such prayer, even in the Federal Congress] through the unsentimental eye of our settled doctrine, it would have to strike it down as a clear violation of the Establishment Clause."[66] Reminding us that in concurring with a 1963 decision of the Court striking down official prayers and Bible reading in the public schools he had then written that, in contrast to those forbidden practices, invocational prayers in legislative chambers would probably not implicate the Establishment Clause,[67] Justice Brennan now says, without pulling any punches, that "after much reflection, I have come to the conclusion that I was wrong then and that the Court is wrong today."[68]

On April 25, 1984, William Brennan, Jr. will be 78 years old and will have served for twenty-eight years on the United States Supreme Court. In order to break Justice Douglas's thirty-six year record he must serve until he is at least 87, hopefully well beyond Ronald Reagan's tenure in the White House, but still short of the retirement from the Supreme Court bench of Oliver Wendell Holmes Jr. at the age of 90. So it can be done. Let us hope that it will be done. The First Amendment needs him, now more than ever.

Endnotes

[1]Two of Justice Black's most notable deviations from a consistent devotion to the First Amendment were his opinion for the Court in Adderley v. Florida, 385 U.S. 39 (1966), upholding the convictions of civil rights demonstrators for trespassing on the grounds of a jailhouse in Tallahassee, Florida, and his dissenting opinion in Tinker v. Community School District, 393 U.S. 503 (1969) at 515, decrying the extension of First Amendment rights to students in a public school building.

[2]Examples of Justice Douglas's less than comprehensible positions in First Amendment cases were his exegesis on the Vietnam War in dissenting from the conviction of David Paul O'Brien for draft-card burning, U.S. v. O'Brien, 391 U.S. 367 (1968) at 389; his concurring comments about the clear-and-present-danger test in Brandenburg v. Ohio, 395 U.S. 444 (1969) at 450; and his vote and concurring opinion in Lehman v. Shaker Heights, 418 U.S. 298 (1974) at 305, upholding a prohibition on political, but not commercial, display advertisements on public transit vehicles.

[3]Barenblatt v. U.S., 360 U.S. 109 (1959).

[4]Uphaus v. Wyman, 360 U.S. 72 (1959).

[5]Wilkinson v. U.S., 365 U.S. 399 (1961).

[6]Braden v. U.S., 365 U.S. 431 (1961).

[7]Communist Party v. Subversive Activities Control Board, 367 U.S. 1 (1961).

[8]Street v. New York, 394 U.S. 576 (1969); Smith v. Goguen, 415 U.S. 566 (1974); Spence v. Washington, 418 U.S. 405 (1974); Cahn v. Long Island Vietnam Moratorium Committee, 418 U.S. 906 (1974).

[9]385 U.S. 39.

[10]388 U.S. 307

[11]401 U.S. 154.

[12]407 U.S. 551.

[13]408 U.S. 1.

[14]408 U.S. 665.

[15]409 U.S. 109.

[16]413 U.S. 548.

[17]413 U.S. 601.

[18]417 U.S. 733.

[19]408 U.S. 907.

[20]424 U.S. 448.

[21]424 U.S. 507.

[22]427 U.S. 50.

[23]433 U.S. 119.

[24]433 U.S. 562.

[25]438 U.S. 1.

[26]444 U.S. 507.

[27]453 U.S. 280.

[28]456 U.S. 615.

[29]447 U.S. 557.

[30]453 U.S. 490.

[31]376 U.S. 254 at 270.

[32]372 U.S. 59 at 70.

[33]380 U.S. 479 at 487.

[34]Gooding v. Wilson, 405 U.S. 518 at 524.

[35]Globe Newspaper Company v. Superior Court, 457 U.S. 596 (1982) at 607.

[36]Rosenbloom v. Metromedia, 403 U.S. 29 at 43.

[37]Gertz v. Welch, 418 U.S. 323 (1974).

[38]Ibid. at 361.

[39]See, for example, Anthony Lewis, "The New York Times v. Sullivan Reconsidered: Time to Return to 'The Central Meaning of the First Amendment,'" 83 Columbia Law Review 603 (1983). See also Policy Statement on Libel adopted by the Board of Directors of the American Civil Liberties Union, January, 1983.

[40]Elrod v. Burns, 427 U.S. 347.

[41]Shakman v. Democratic Organization of Cook County, 481 F. Supp. 1315. (N.D. Ill. 1979).

[42]Board of Education, Island Trees Union Free School District v. Pico, 457U.S. 853 (1982) at 866.

[43]Ibid. at 867-871.

[44]New York Times v. U.S., 403 U.S. 713 at 725-27.

[45]Nebraska Press Association v. Stuart, 427 US 539 at 611-12.

[46]Richmond Newspapers v. Virginia, 448 U.S. 555 at 587-90.

[47]Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94 at 189, 200.

[48]Lehman v. Shaker Heights, 418 U.S. 298 (1974).

[49]Ibid. at 305.

[50]Ibid. at 299.

[51]Ibid. at 303.

[52]Greer v. Spock, 424 U.S. 828 at 849.

[53]Ibid. at 861.

[54]F.C.C. v. Pacifica Foundation, 438 U.S. 726 at 762, 770, 773.

[55]Roth v. U.S., 354 U.S. 476 at 485.

[56]Smith v. California, 361 U.S. 147.

[57]Jacobellis v. Ohio, 378 U.S. 186 at 191.

[58]A Book Named John Cleland's "Memoirs of a Woman of Pleasure" v. Attorney General of the Commonwealth of Massachusetts, 383 U.S. 413 at 418.

[59]Paris Adult Theatre I v. Slaton, 413 U.S. 49 at 114.

[60]Ginzburg v. U.S., 383 U.S. 463 at 467.

[61]Ginsberg v. New York, 390 U.S. 629.

[62]458 U.S. 747 (1982).

[63]Ibid. at 777.

[64]Ibid.

[65]Marsh v. Chambers, 51 U.S. Law Week 5162.

[66]Ibid. at 5166.

[67]Abington School District v. Schempp, 374 U.S. 203 at 213.

[68]51 U.S. Law Week 5165.

PUBLIC FIGURE LIBEL AFTER SULLIVAN: GOLDWATER V. GINZBURG

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In 1964 the Supreme Court considered the libel suit of Montgomery, Alabama, City Commissioner L.B. Sullivan against The New York Times.[1] Commissioner Sullivan had been awarded $500,000 for inaccurate statements in an advertisement printed in the paper on March 29, 1960. The trial jury found for Commissioner Sullivan and that judgment has been upheld through the full appeal process in the Alabama state court system even though the factual errors were not significant, the advertisement did not mention Commissioner Sullivan, and no evidence of damage had been presented at trial.

In setting aside the verdict against The New York Times the Supreme Court created a category for people identified as public figures. The court said that this group of people with access to the media needed to prove more than just factual error in order to sue successfully. Since uninhibited, robust, and wide-open debate on public issues might well result in unintended factual errors, the Court concluded that a public figure must prove that defamatory statements had been published with actual malice or a reckless disregard for the truth.

In the major libel cases following Sullivan an important issue became that of defining a public person with plaintiffs seeking to be included in the category of private persons while the journalist defendants hoped to have the subjects of the alleged defamation classified as public persons. The reason for this contest is clear: a public person plaintiff has a much greater legal burden of proof to sustain. Classification of the plaintiff as a public person became an almost perfect defense against a libel suit. Given this situation, it is not surprising that the Supreme Court has been asked on several occasions to address the issue of who is a public person.[2] However, a review of those cases is not the subject of this study.

The first major libel case involving an admitted public person tried under the Sullivan rule was the suit by Barry Goldwater against Ralph Ginzburg and fact magazine. This too often overlooked case provides an excellent illustration of the legal tactics that a public person must use in the post-Sullivan era to obtain a libel judgment that will hold up on appeal. This case further illustrates the role played by pre-trial discovery that opens unpublished materials to inspection by the plaintiff. Supreme Court recognition and approval of the techniques used in this case did not come until Herbert v. Lando, eleven years after Goldwater v. Ginzburg was tried.[3] The purpose of this study is to examine the basis for the Goldwater suit, the evidence and argument used by the opposing sides in an effort to sustain their positions, and the appeals courts responses to the trial outcome.

I

The 1964 Presidential campaign between Barry Goldwater and Lyndon B. Johnson was clearly characterized by uninhibited, robust, and wide-open public debate even if much of that debate had little to do with the major campaign issues. This campaign was one of the dirtiest and most vicious of recent years. The lack of uncertainty about the outcome of the election seemed only to stimulate the candidates' partisans to greater and greater malice. The battle of the paperback books included such items as Barry Goldwater Extremist of the Right which sought to establish Goldwater's ties to various organizations of the radical right, and None Dare Call It Treason which through spurious quotation and documentation attempted to establish the Communist domination of all liberal politicians and political ideas.[4] Even the two major political parties got into the act. Republic Party offices around the country distributed copies of A

Choice Not an Echo which in large part was an attack on the liberal wing of the Republican Party. For the Democrats a popular item was The Goldwater Cartoon Book containing a selection of some of the most irresponsible political cartoons attacking Goldwater.[5]

The piece de resistance of this unsavory campaign came in the form of the September-October 1964 issue of fact magazine.[6] On magazine stands throughout the country the front cover of fact proclaimed in letters almost an inch high, "1,189 Psychiatrists Say Goldwater Is Psychologically Unfit To Be President!" Under the heading, "What Psychiatrists Say About Goldwater:" the back cover of the magazine provided the browser with choice extracts from the material inside.

> "B.G. is in my opinion emotionally unstable, immature, volatile, unpredictable, hostile, and mentally unbalanced. He is totally unfit for public office and a menace to society..."
>
> "My clinical impression is that he is a paranoid personality with dominance of subjective views over objective..."
>
> "His theme is 'freedom'--but from what? Unconsciously, it seems to be from his mother's domination..."
>
> "B.G.'s proneness to aggressive behavior and destructiveness indicates an attempt to prove his manliness..."
>
> "He consciously wants to destroy the world with atomic bombs. He is a mass-murderer at heart and a suicide. He is amoral and immoral. A dangerous lunatic!"

Those who paid $1.25 to take a copy of fact home discovered that this 64 page issue, subtitled, "The Unconscious of a Conservative: A Special Issue on the Mind of Barry Goldwater," was in two parts. The first section was a highly selective biography of Goldwater written by fact publisher Ralph Ginzburg. The biography was in large part a cut and paste job based on a number of other magazine articles about the Senator, campaign biographies, and Why Not Victory? and other writings by the Senator. From these sources, each one of which was clearly credited, Ginzburg put together a word portrait of a psychological misfit who was the product of an emotionally disturbed home and the victim of at least two nervous brekdowns. Ginzburg's own characterization of Goldwater referred to "his paralyzing, deep-seated, irrational fear," and "his paranoid divorce from reality."

The major portion of the magazine was devoted to a selection of the comments that had been received from the psychiatrists polled by fact. This selection was preceded by the following three-paragraph explanation:

> On July 24, one week after Barry Goldwater received the Republican nomination, FACT sent a questionnaire to all of the nation's 12,356 psychiatrists asking, "Do you believe Barry Goldwater is psychologically fit to serve as President of the United States?" (The names were supplied by the American Medical Association).
>
> In all, 2,417 psychiatrists responded. Of these, 571 said they did not know enough about Goldwater to answer the question; 657 said they

thought Goldwater was psychologically fit; and 1,189 said that he was not. (It might be pointed out that the majority of those who thought Goldwater was psychologically fit nevertheless said they were not voting for him).

FACT'S questionnaire left room for "Comments" and over a quarter of a million words of professional opinion were received. On the next 41 pages we present a sampling of these comments, which, all together, constitute the most intensive character analysis ever made of a living human being.

The selection contained quotations from 162 questionnaires, 61 of which were signed either "Anonymous" or "name withheld." Some of the signed comments were critical of fact.

What type of yellow rag are you operating? I have never in my life witnessed such a shabby attempt to smear a political candidate. I would suggest that you change the name of your magazine to "Fancy", or better, "Smear"!

Marvin J. Allison, M.D.
Richmond, Virginia

If you will send me written authorization from Senator Goldwater and arrange for an appointment, I shall be happy to send you a report concerning his mental state.

The same goes for you.

Hubert Miller, M.D.
Detroit

Your "survey" raises doubts in my mind as to your psychological fitness to publish any national magazine, especially one named "FACT."

Edmund V. Cowdry, Jr., M.D.
St. Louis

However, the overwhelming majority of the quotations were in the tone of the phrases presented on the back of the magazine.

There was a good bit of unfavorable reaction to the publication of this issue of fact and the large scale advertising promotion of the issue.[7] Perhaps the sharpest response was that of the American Medical Association. The A.M.A. questioned the whole sampling procedure and vehemently denied having "supplied" fact with a list of psychiatrists.[8] The names had actually come from a mailing list rented from a company licensed by the A.M.A. to supply such information.[9]

II

The most significant reaction to this fifth issue of fact came from Senator Goldwater. On September 2, 1965, almost exactly a year after the first ads for this issue appeared Goldwater filed a $2 million libel suit in the Federal District Court in New York City against fact, Publisher Ralph Ginzburg and Managing Editor Warren Boroson. The Supreme Court's decision in the Sullivan case was obviously taken into consideration in preparing the suit which claimed that the publication had shown "actual malice." Ginzburg responded in in a press release two days later which claimed that his magazine had performed

a valuable service in presenting the information about Goldwater. He viewed the dispute between fact and Goldwater in terms of freedom of speech--a conflict between freedom and repression in which freedom would win.[10]

The Goldwater suit finally came to trial in May 1968, over two and one-half years after the suit had been filed. The basic reason for the delay was the overcrowded schedule of civil cases waiting to come to trial in New York City. In order to facilitate the trial of a civil case there is often an extensive series of discussions between the two sides prior to the trial. Agreements are worked out regarding the scope and nature of the evidence and testimony to be presented at the trial. Depositions, often including cross-examination, are taken from the principal parties in the suit. Thus the case to be presented to the jury is fairly well established prior to the trial. The trial itself simply gives a jury the opportunity to evaluate the case.

For Senator Goldwater a major task during the pre-trial discovery process was to develop evidence to prove actual malice or a reckless disregard for the truth in the activities of Ralph Ginzburg in the production of the issue of fact in question. In the depositions that he gave, Ginzburg was questioned closely regarding the basis for his selection of materials to include in the magazine and the reasons for exclusion of other materials. In addition, during the discovery process Ginzburg was required to provide documents related to the preparation of the alleged defamation. These included copies of material published about Senator Goldwater marked to indicate what portions were to be used in the fact biography as well as all the original 2,417 questionnaires that fact had received. Because of the requirement that actual malice or reckless disregard had to be proven, Senator Goldwater's lawyers were given broad latitude for their discovery requests. A full review of the materials developed in discovery and presented later at trial can be found in the opinion of Judge Waterman for the Second Circuit Court of Appeals.[11]

The trial which began Monday, May 6, took three weeks to complete. The positions of the two sides was presented by the opposing lawyers at the outset. For Goldwater Attorney Roger Robb claimed that fact had "published false, scandalous, defamatory statements knowing them to be false or recklessly not caring if they were true or not." Proof of this claim would be needed to establish actual malice and win the suit. Ginzburg's lawyer, Harris Steinburg, presented a two part defense of his client. First, even though the magazine was "racy and tough," it was good journalism and entirely true. Second, even if the material were not entirely true, "the defendants published the articles in good faith, with no intention to lie, and in the belief that they were making a rightful, responsible contribution to predicting how a candidate might perform if elected."[12]

With the issues now clearly drawn the case for Goldwater began with an immediate attempt to prove that statements in fact were false. The Senator's wife was presented as a witness, and she testified that her husband had never had a nervous breakdown and had never professionally visited a psychiatrist.[13] The following morning Goldwater himself took the witness stand to begin what was to be six full days of testimony and cross-examination. In direct testimony he restated the previously established points that he had never seen a psychiatrist or had a nervous breakdown. When asked about the specific incident that had been characterized by fact as a mental breakdown, the Senator said that once when he was thoroughly exhausted he had taken a ten day vacation with his family. Personal medical records and his military fitness record were introduced as supporting evidence.[14] The final point established in Goldwater's two days of direct testimony was that the Senator had suffered mentally from fact's "totally dishonest" picture of him. This testimony was presented to show that there had been actual damage.[15]

Following his direct testimony Senator Goldwater was subjected to almost four full days of cross-examination by Attorney Steinburg. The basic thrust of the questioning was an effort to show that while fact's statements might have been false in some details, the general picture of Goldwater was

accurate. His private life, his military career, and his record as United States Senator were probed in an effort to show some qualities that might support the broad diagnosis of paranoia.[16] When this effort failed, Steinburg tried to reverse roles to make fact appear to be the victim rather than Goldwater. An example of this approach was the questioning of Goldwater's motives for bringing suit. He was charged with seeking publicity for his senatorial campaign, and he denied the charge. He was accused of picking on fact rather than strong opponents such as the Columbia Broadcasting System or The New York Times. Goldwater answered that their attacks on him lacked the malice of fact's attack. He indicated that the basic reasons for his suit were the four charges that he was an "anal character," a latent homosexual, paranoid, and similar to Adolf Hitler.[17]

After Goldwater completed his testimony and cross-examination, additional evidence was presented on his behalf dealing with the question of malice. In order to prove a reckless disregard for truth testimony was presented by professional pollster B.W. Roper regarding the fact survey upon which the Goldwater issue was based. It was established that the number of responses was too small to be statistically valid, that the questions were slanted against Goldwater, that no questions were asked regarding Goldwater's election opponent Lyndon Johnson, and that it was unclear whether fact was asking for a personal or a professional response.[18]

The last two days of testimony for the plaintiff revolved around the material that had been developed during the pretrial discovery process. In order to demonstrate malicious intent for the jury, the Senator's lawyers read from depositions that showed that Ginzburg and Boroson had determined the conclusions to be presented even before their survey of psychiatrists had been conducted. The original questionnaires that the court had ordered Ginzburg to produce were introduced. These were compared with the quotations published in fact in order to show repeated examples of selective editing, distortion, and inaccurate quotation. The argument presented was that these were clear examples of malicious intent.[19]

The case for the defendants in this suit was developed on two levels. First, it was argued that the controversial issue of fact was fundamentally accurate, truth being a whole defense in libel cases. If inaccuracies appeared, they arose from the sources used rather than any errors or omissions by Boroson and Ginzburg. In this regard pretrial depositions from five of the psychiatrists who had participated in the survey were read. Each said that his published opinion was an accurate representation of his personal (not professional) evaluation. In addition, Warren Boroson testified that the publication arose out of an honest effort to assess Senator Goldwater's fitness to be President. He denied writing anything false about Goldwater or any malicious intent on the part of anyone at fact.[20] This concluding statement introduced fact's second line of defense: even if some of the statements made were false, they were made without malicious intent.

The major portion of the case for fact magazine rested on the testimony of its publisher, Ralph Ginzburg. In direct testimony Ginzburg represented himself as a conscientious journalist trying to the best of his ability to do his job. He characterized the fact issue in question as a valuable historical contribution, claimed that he simply tried to make an accurate presentation of what people were saying about Goldwater, and stated unequivocally that he bore the Senator no malice. To this extent Ginzburg's testimony forcefully paralleled Boroson's.[21] Senator Goldwater's attorney, Roger Robb, used his cross-examination of Ginzburg to introduce an extended series of specific examples of materials published that had been drawn out of context or in other ways deliberately misrepresented the original sources. On the basis of this cross-examination it was charged that fact had published statements known to be false with a reckless disregard for their truth. If the jury were to accept these charges, the actual malice needed to award damages would be proven. Under this attack Ginzburg was forced to admit that statements in fact had been false. However, he claimed that they were a fair and proper journalistic

comment on a public figure.[22]

On Friday, May 24, at the end of the third week of the trial, Judge Harold Tyler instructed the jury regarding the points of law in the case. He explained to the jury that since Senator Goldwater was a public figure they had to find that there had been malice in the publication in order to render a verdict against fact. A finding of malice would depend upon whether the jury believed that the defendant knew what was being published was untrue. The argument that the defendant was only publishing untrue statements that had their origin elsewhere would be not adequate grounds for finding no malice. Finally, if the jury found that Senator Goldwater has been libeled they could award compensatory damages for actual injury, punitive damages to punish the defendant for his misdeed, or both.[23]

While the trial had been lengthy, the jury's deliberations were brief. The verdict was returned the same afternoon that they received the case. Ralph Ginzburg and fact were found guilty of libel. Senator Goldwater was awarded $1,000 in compensatory damages, $25,000 in punitive damages from Ginzburg, and $50,000 in punitive damages from fact. Both the verdict and the nature of the damage award was a blow to Ginzburg because the award indicated that even though libel had been committed he and fact lacked the stature to inflict any real damage.[24] Ginzburg, however, in a prepared press release, indicated his intention to appeal and still presented the case as one involving freedom of speech.

> Some very important First Amendment rights are involved here. The price that I'm paying is $75,000 but the price that the American public will have to pay is incalculable. Some of the stuff was not true, but it constituted fair opinion.[25]

The Court of Appeals for the Second Circuit took slightly more than a year to hear the case and hand down a decision upholding the verdict against Ginzburg. The Court's opinion reviewed at length the trial record and found that it contained clear proof of malice. In his appeal Ginzburg had pressed the point that he was merely reprinting what others had said about Goldwater. The court rejected this argument.

> Repetition of another's words does not release one of responsibility if the repeater knows that the words are false or inherently improbable, or there are obvious reasons to doubt the veracity of the author of the report. ...Furthermore, in our case, Ginzburg added certain innuendos to some quoted statements and quoted other statements out of context in order to support his predetermined result.[26]

This adverse decision by the Court of Appeals was appealed to the Supreme Court, and that court exercised its right to refuse to consider the case. The only written opinion was a dissent from this judgment written by Associate Justice Hugo Black, joined by Justice William O. Douglas, who believed that the court should have heard the case. Justice Black's consistent position had been that the guarantee of freedom of speech is absolute and that any libel actions violated that guarantee. He said, "I cannot ascribe to the result the Court reaches today because I firmly believe that the First Amendment guarantees to each person in this country the unconditional right to print what he pleases about public affairs."[27] He restated his objection to the exception for actual malice in libel suits allowed in New York Times Co. v. Sullivan and added,

> Extravagant, reckless statements and even claims which may not be true seem to me an

> inevitable and perhaps essential part of the process by which the voting public informs itself of the qualities of a man who would be President. The decisions of the District Court and the Court of Appeals in this case can only have the effect of dampening political debate by making fearful and timid those who should under our Constitution feel totally free openly to criticize Presidential candidates. Doubtless, the jury was justified in this case in finding that the Fact articles on Senator Goldwater were prepared with a reckless disregard of the truth, as many campaign articles unquestionably are. But, even if I believed in a balancing process to determine scope of the First Amendment, which I do not, the grave dangers of prohibiting or penalizing the publication of even the most inaccurate and misleading information seem to me to more than outweigh any gain, personal or social, that might result from permitting libel awards such as the one before the Court today. I firmly believe it is precisely because of these considerations that the First Amendment bars in absolute, unequivocal terms any abridgment by the Government of freedom of speech and press.[28]

III

With the Supreme Court's refusal to grant an appeal the case of Goldwater versus Ginzburg had ended more than five years after the Goldwater issue of fact had been published. This often overlooked case is significant in the study of the law of libel because it provides an excellent example of the proof needed by a public person in order to establish the fact of actual malice needed to win a judgment. The legal rtrategies of both sides in attempting to persuade a jury on this point can be clearly seen. The opinion of the Court of Appeals in upholding the jury's verdict provides a case book for evidence of malice. Finally, the extensive use of pre-trial discovery allowed to the plaintiff in this case anticipated by more than ten years the reasoning of Herbert v. Lando. While the issue of who is a public person continues to haunt the courts, the Goldwater suit provides the model of evidence used by a public person to prove malice.

Endnotes

[1]New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

[2]441 U.S. 153 (1979).

[3]See especially Rosenblatt v. Baer, 383 U.S. 75 (1966), Rosenbloom v. Metromedia, 403 U.S. 29 (1971), Gertz v. Welch, 418 U.S. 323 (1974), and Time v. Firestone, 424 U.S. 448 (1976).

[4]Fred J. Cook, Barry Goldwater Extremist of the Right (New York: Grove Press, Inc., 1964); John A. Stormer, None Dare Call It Treason (Florissant, Missouri: Liberty Bell Press, 1964).

[5]Phyllis Schlafly, A Choice Not an Echo (Alton, Illinois: Pere Marquette Press, 1964); Pat Frank, ed., The Goldwater Cartoon Book (Washington, D.C.: National Publishing Company, 1964).

[6]fact, I, #5 (September-October 1964). All the following fact quotations are taken from this issue.

[7]For example, fact ran a full page ad in the September 20, 1964 issue of The New York Times (Sec. IV, p. 5) under the headline, "Is Barry Goldwater Psychologically Fit To Be President of the U.S.?"

[8]The New York Times, October 6, 1964, p. 20.

[9]Goldwater v. Ginzburg, 414 F. 2d 324 (2d Cir. 1969), at 329, footnote 4.

[10]The New York Times, September 5, 1965, p. 42

[11]414 F. 2d 324, at 328-335. The rationale for allowing such extensive discovery is eventaully stated by the Supreme Court in Herbert v. Lando, 441 U.S. 153 (1979).

[12]The New York Times, May 7, 1968, p. 21.

[13]Ibid.

[14]Ibid., May 8, 1968, p. 28.

[15]Ibid., May 9, 1968, p. 35.

[16]Ibid., May 10, 1968, p. 15.

[17]Ibid., May 11, 1968, p. 72.

[18]Ibid., May 16, 1968, p. 44.

[19]Ibid., May 17 1968, p. 20 and May 18, 1968, p. 27.

[20]Ibid., May 21, 1968, p. 32.

[21]Ibid., May 22, 1968, p. 44.

[22]Ibid., May 23, 1968, p. 27

[23]Ibid., May 25, 1968, p. 1

[24]Ibid.

[25]Ibid., May 26, 1968, p. 14.

[26]414 F. 2d 324, at 337.

[27]Ginzburg v. Goldwater, 396 U.S. 1049 (1969), at 1050.

[28]Ibid., at 1052.

THE UNCIVIL SERVANTS: PUBLIC EMPLOYEES AND POLITICAL EXPRESSION

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> The end sought by Congress through the Hatch Act is better public service by requiring those who administer public funds for public needs to abstain from political partisanship. Oklahoma v. U.S. Civil Service Commission[1]

> This civil service law is the biggest fraud of the age. It is the curse of the nation. There can't be no real patriotism while it lasts. George Washington Plunkett[2]

Within the context of contemporary First Amendment theory, the protection and restriction of political expression by government employees have raised several unique, interesting, and, as yet, unresolved issues. Franklyn S. Haiman has noted the inconsistencies in theory and application resulting from legislation intended to prevent government employees "from unfairly tipping the balance of the political scales in favor of incumbents, as well as to protect public job holders from being drafted into partisan activity by their superiors."[3] Thomas Emerson has suggested that some restrictions may be necessary to preserve a healthy system of freedom of expression. For example, he contended that the market place of ideas should be protected from domination by the government and and its agents, and further, he said that no First Amendment problems would be raised by legislation prohibiting government employees from intimidating or coercing subordinate employees or benefit recipients.[4]

While legislation and executive action seem to have successfully achieved the laudatory purpose cited above, that accomplishment has not been realized without also restricting the legitimate First Amendment rights of federal employees to engage in voluntary political expression and activity. In view of that consequence, said Emerson, "it is a matter of grave concern whether such a large number of persons in the nation are to be seriously restricted in their expression on controversial public issues, in their political activities, or otherwise in their normal role as citizens."[5]

Most of the analytic literature has focused upon the Hatch Act restrictions on certain employees of the executive branch of government; however, this study will take a broader view of the issue. First, it will review the governmental philosophy embodied in the Hatch Act, as amended by Congress and interpreted by the United States Civil Service Commission and the United States Supreme Court, examining the internal inconsistency of the theory as it is applied to different classes of executive branch employees. Second, it will focus upon the regulation and restriction of similar political activity and expression by officials and employees of the legislative and judicial branches, comparing those practices with the theory of executive branch restrictions. Finally, suggestions will be offered for legislative revisions which promote and protect political expression by almost three million citizens employed in the executive branch while maintaining safeguards against undue influence upon the system of freedom of expression and coercion of government employees by their superiors.

The Executive Branch

Congress first considered limiting the political activities of federal employees in 1791, and President Jefferson issued the first executive branch limitations in 1801, so the problem of trying to maintain a politically neutral federal workforce is not of recent origin.[6] The first major legislative step to address the problem was the Civil Service Act of 1883, which attempted to end the system of spoils and patronage in the employment, promotion, and dismissal of executive branch employees.[7] The Act to Prevent Pernicious Political Activities of 1939, popularly referred to as the Hatch Act, went even further in restricting the activities of federal employees.[8]

Enactment of the Hatch Act resulted from widespread complaints about misuse and abuse by and of federal employees during the elections of 1936 and 1938. The Special Committee on Campaign Expenditures and Use of Government Funds, chaired by Senator Morris Sheppard, documented numerous cases of political coercion in ten states, primarily involving Works Progress Administration supervisors and employees, and Congress responded with comprehensive legislation on August 2, 1939.[9] The Hatch Act has since been amended on sixteen occasions, and its major provisions are presently codified at 5 U.S.C. §§7321-7327.[10]

Several sections of the Hatch Act deal with prohibitions on coercion of contributions and political service from government employees and on abuse of official authority by government employees to coerce political action or influence elections.[11] These provisions fall within the acceptable categories of regulation outlined by Emerson discussed above. The most controversial section, and the one of primary concern to this study, is §9(a), codified as 5 U.S.C. §7342(a)(2), which states that employees of executive branch agencies may not "take an active part in political management or in political campaigns."

In 1940, Congress attempted to elaborate on the scope and definition of the prohibited political activities by specifying that it included all such activities "as the United States Civil Service Commission has heretofore determined are at the time this section takes effect prohibited on the part of employees in the classified civil service of the United States by the provisions of the civil service rules prohibiting such employees from taking an active part in political management or political campaigns."[12] Those Civil Service Commission rulings, which number more than 3,000, dated from President Theodore Roosevelt's Executive Order No. 642, issued on June 3, 1907. The Order stated that executive branch employees, "while retaining the right to vote as they please and to express privately their opinions on all political subjects, shall take no part in political management or political campaigns."

Recent pronouncements from the United States Office of Personnel Management, successor to the United States Civil Service Commission, interpret Section 9(a) to prohibit: (1) being a candidate for nomination or election to a national or state office; (2) becoming a partisan candidate for nomination or election to any public office; (3) campaigning for or against a political party or candidate in a partisan election for public office or political party office; (4) serving as an officer of a political party, a member of a national state, or local committee of a political party, an officer or member of a partisan political club, or being a candidate for any of these positions; (5) participating in the organization or reorganization of a political party, organization, or club; (6) soliciting, receiving, collecting, handling, disbursing, or accounting for assessments, contributions, or other funds for a partisan political dinner; (8) taking an active part in managing the political campaign of a candidate in a partisan election for public office or political party office; (9) working at the polls on behalf of a candidate or political party by acting as a checker, challenger, or watcher; (10) distributing campaign literature; (11) serving as a delegate, alternate, or proxy to a political party convention; (12) addressing a convention, rally, caucus, or similar gathering of a political party in support of or in opposition to a candidate for public office or political party in support of or in opposition to a candidate for public office or political party office, or on a partisan political question; (13) endorsing

or opposing a candidate in a partisan election through a political advertisement, broadcast, campaign literature, or similar material; (14) driving voters to the polls on behalf of a political party or candidate in a partisan election; or (15) initiating or circulating a partisan nominating petition.[13]

On two separate occasions, the United States Supreme Court has considered constitutional challenges to §9(a) of the Hatch Act, and on both occasions it has upheld the constitutionality of the Act despite the acknowledgment that the First Amendment rights of government employees were being restricted. In the first case, United Public Workers v. Mitchell, 330 U.S. 75 (1947), Mr. Poole, a roller at the United States Mint in Philadelphia, served as a ward executive committeeman of a political party and took leave time to be politically active on election day as a worker at the polls. In a 4-3 decision, the Court held that the Hatch Act, as applied to Mr. Poole, did not violate his First Amendment rights. Congress could, said the Court, reasonably restrict the First Amendment rights of federal employees to promote efficiency in the public service, avoid a tendency toward one-party system or political machines, and reduce the possibility of political considerations for advancement within the service.

In the second case, United States Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548 (1973), a divided three-judge District Court had held §9(a) unconstitutional on the grounds that it was vague and over broad as to exactly what was allowed and prohibited by the volumes of Civil Service Commission rulings interpreting political management and political campaigning. The United States Supreme Court, however, reversed the lower court and upheld the constitutionality of §9(a). The Court held that the specificity of the Code of Federal Regulations was clear and that Congress could balance the First Amendment rights of federal employees as citizens against Congress' perceived need and legitimate power to promote fair, efficient, and effective government service, preserve the role of free election in representative government, protect employees from improper influence, and present the appearance of impartiality in government services.

Abuse of official authority to influence elections and coercion of any citizen to render political service or to vote in a certain manner are acts beyond the scope of the First Amendment protection, and as such they have been appropriately proscribed by certain sections of the Hatch Act as well as corresponding provisions of the Criminal Code.[14] While Congress and the Court have not deemed them so as a matter of policy or constitutional law, these statutes appear to have been effective in reducing the above cited abuses, and no evidence has been offered to substantiate the need for the far reaching additional restrictions on individual political expression imposed by §9(a).

Assuming, as Congress and the Court have, that the First Amendment rights of federal employees should also be restricted for the purposes of promoting efficient government and presenting the appearance of impartiality, there seem to be several inconsistencies in the application of that theory--not only between the various branches of government but also within the executive branch. First, the federal employees with the highest public visibility and the greatest policy-making authority have been exempted from coverage. The President and his considerable executive office staff are not subject to the §9(a) restrictions; furthermore, neither the heads or assistant heads of executive agencies nor other persons appointed by the President with advice and consent of the Senate are covered by this provision of the Hatch Act.[15] So, while U.S. Attorneys, U.S. Marshals, the Director of the F.B.I., the head of the C.I.A., F.T.C. Commissioners, the Director of the E.P.A., Ambassadors, the Attorney General, and the Secretaries of Defense, Commerce, Treasury, Education, Health and Human Services, Energy, Interior, Housing and Urban Development, State, Labor, and Transportation are free to make political speeches, even to their "client populations," in support of the reelection of the President who appointed them, the clerks and secretaries in their employ are prohibited from speaking out in opposition to or support of their own Congressman's reelection efforts.

There would appear to be no less important an interest in regulating the efficient and impartial operation of these visible and influential employees than in proscribing like conducts by nameless and faceless bureaucrats who might also wish to express their views. If the Postmaster General can make a partisan political speech to the National Association of Letter Carriers without impairing the operation of the postal system, it would seem that a roller in the U.S. Mint might serve as ward captain or a nurse in the V.A. hospital might write a letter to the editor supporting her father's campaign for sheriff without affecting the value of the dollar or the health of the patients.

Other sections of the Hatch Act also make exceptions which appear to undermine the theory of governmental efficiency and the public perception of impartiality as the standards for political neutrality. For example, employees are permitted to engage in political activity in a non-partisan election.[16] This section, in effect, allows federal employees to be active in campaigns regarding constitutional amendments, referendums, approval of municipal ordinances, campaigns for office where none of the candidates are running as Democrats or Republicans. It is difficult to understand the consistency of regulations which contend that efficiency or impartiality would be less impaired by employees becoming actively involved in a campaign between Congressional candidates representing the States Rights and Socialist Workers parties than in one between state legislative condidates representing the Democratic and Republican parties.

Finally, further exceptions allow federal employees to be politically active in partisan municipal elections in certain political subdivisions ranging from Shrewsbury Township, New Jersey to Elmer City, Washington.[17] The rationale behind this exemption is that elections in these districts, where a majority of the citizens are federal employees, present unusual circumstances which make it "in the domestic interest of the employees and individuals to permit that political participation."[18] Two questions are raised by this exemption. First, when federal employees constitute a majority of the voters, such a provision would seem, under the original Congressional philosophy, to make it more likely that an employee-based political machine would dominate elections. Second, it would appear that support for or opposition to Presidential and Congressional candidates who propose sweeping changes in the size of government or the scope of domestic social programs would have a more direct bearing on the "domestic interest" of federal employees than would support or opposition to an aldermanic candidate in Seat Pleasant, Maryland.

The Legislative Branch

While few scholars would care to attend a debate on the relative efficiency of the operations of Congress and that of the Federal bureaucracy, it is productive to compare the standards the legislative branch has applied to its own employees with those they have enacted restricting political activity by executive branch employees. Neither the Hatch Act nor any other statute places any special restrictions on the political speech of Senators, Congressmen, or their staff employees. In contrast to executive branch employees such as Mr. Poole, the Senate Select Committee on Ethics has ruled that Senate employees can engage in partisan political activity on their "own time," "outside of working hours," or "while on recorded vacation leave."[19]

During the 95th Congress, the Senate Special Committee on Official Conduct recommended a rule change which would have required Senate staff employees engaged substantially in campaign work to be removed from the Senate payroll.[20] The proposed rule was eventually dropped from the final measure, but the issue was referred to the Senate Committee on Rules and Administration for further study.[21] Three months later, the Rules Committee reported that it was "not aware of any laws which prohibit individuals who are part of a Senator's staff from participating in a Senator's reelection campaign as long as they do not neglect their Senate duties, and the Committee does not feel there should be any such proscription. Furthermore, it is neither illegal nor a violation of Senate rules for a member of a Senator's staff to work full time in political

campaigns while on annual leave or vacation time or while on leave of absence from his or her Senate duties, and the Committee feels there should not be any proscription of such actions."[22] Going even further, the Senate Select Committee on Ethics has stated that it "believes that Senate employees may engage in limited campaign-related activities during Senate hours, provided that the time involved is de minimus and such activity does not interfere with the employee's official Senate duties."[23]

With regard to political fund raising activity, there is also a discrepancy between the restrictions on executive and legislative branch employees. Senate Rule XLI provides that "no officer or employee of the Senate may receive, solicit, be a custodian of, or distribute any funds in connection with any campaign for the nomination for election, or the election, of any individual to be a member of the Senate or to any other Federal office."[24] That same rule, however, provides that a Senator may designate two staff members to perform any of those functions for that member's campaign. Two statutory provisions of the criminal code also prohibit Senators from soliciting contributions from federal officers or employees and prohibit staff members from soliciting contributions from federal employees or making contributions to their employer.[25] Even these provisions, however, are not absolute. Senators may legally solicit campaign contributions from other Senators, and staff members may spend as much as $1,000 in hosting a fund raising event at his or her own residence to raise campaign funds for his boss.[26]

Even those Senate employees not specifically exempted from the prohibitions of Rule XLI are permitted to "attend a campaign fund raising event outside office hours,"[27] "assist in planning and making arrangements for fund raisers so long as they do not become involved with solicitation of funds,"[28] and can solicit, receive, handle, and disburse campaign funds for partisan campaigns for state and local elective office.[29] Furthermore, in contrast to executive branch employees, the Ethics Committee has ruled that Senate employees may hold the position of National Committeeman or Committeewoman for partisan political parties, may serve as a political party precinct chairperson, and may run for election for delegate to state or national party convention, or even for local, state, or federal elective office.[30]

It has been contended that other statutory provisions, such as those prohibiting false statements, false claims, and fraud against the government with regard to clerk hire appropriations, might also restrict staff members engaged in campaign activity.[31] Civil suits initiated by priviate citizens alleging misuse of government appropriations, however, "have usually proven unsuccessful."[32] In one case, United States ex rel Joseph v. Cannon, a three-judge panel of the Circuit Court of Appeals "dismissed as non-justiciable a civil suit against a member of the Senate initiated by a private citizen under the False Claims Act for the member's payment of a Senate staffer out of official appropriations allegedly for the staffer's campaign work. The Court found that the lack of specificity in the Senate ethical standards concerning the official duties of, and campaigning by a Senate staffer . . ., failed to provide a discernible or manageable 'legal standard' to sustain a cause of action under . . . the False Claims Act."[33]

The Judicial Branch

The political activities of Article III Federal Judges, Article I Judges, U.S. Bankruptcy Judges, U.S. Magistrates, and their employees are not proscribed by the Hatch Act or any other federal legislation; however, similar, and in some cases more restrictive regulations, have been promulgated by the Judicial Conference of the United States. Canon 7 of the Code of Judicial Conduct for United States Judges is headed, "A Judge Should Refrain from Political Activity," and it states, in relevant part, that "a judge should not: (a) act as a leader or hold any office in a political organization or publicly endorse a candidate for public office; (c) solicit funds for or pay an assessment or make a contribution to a political organization or candidate, attend political gatherings, or purchase tickets for political party dinners or other functions."[34]

The above provisions, with regard to attending political gatherings and contributing to candidates and organizations, go beyond the restrictions on executive branch employees under the Hatch Act. Furthermore, the Judicial Conference's Advisory Committee on Judicial Activities has issued several advisory opinions which are even more restrictive. For example, the Advisory Committee has ruled that a judge should not take part in his church's every-member canvass or solicit contributions on behalf of the Boy Scouts of America.[35]

During the Carter administration and while Senator Kennedy was Chairman of the Senate Judiciary Committee, potential judicial appointees were required to resign their membership in any organization which practiced de facto discrimination against women or racial or religious minorities before their nomination and confirmation. In March, 1981, the Judicial Conference of the United States, by formal resolution, "endorsed the principle that it is inappropriate for a judge to hold membership in any organization that practices invidious discrimination."[36] Additionally, the Advisory Committee has ruled that while it "recognizes as a matter of legal right that a spouse can hold office in a political organization and can take part in its activities," a judge "has a duty to try to dissuade his spouse from participating in a political campaign."[37]

Enforcement of these proscriptions on political activity, however, may be no more successful than civil suits against Senators and Congressmen for political abuse of clerk hire appropriations. While an executive branch employee "shall be removed from his position" for engaging in partisan political activities, the Advisory Committee on Judicial Activities has reminded the readers of its opinions that "it is not authorized to impose sanctions" and that "it is for each judge to reach his or her own conclusions as to the propriety of his or her conduct."[38] Citizens can file complaints against judges with the Chief Judge of each circuit, and those complaints can be referred or appealed through the Circuit Council and the Judicial Conference of the United States to the House Judiciary Committee for impeachment hearings. It should be noted, however, that on at least one occasion the House Judiciary Committee has determined that active involvement by a federal judge in a Congressional election did not constitute grounds for a resolution of impeachment.[39]

Federal judicial employees, such as Clerk, Deputy Clerks, Probation Officers, Staff Attorneys, Circuit Executives, and Law Clerks, are not specifically covered by the §9(a) proscriptions of the Hatch Act, however, the Judicial Council of the United States, in September, 1943, resolved "that it is incompatible with the proper service of the federal judiciary for its officers or employees to become candidates for political office or participate in other political activities of a kind forbidden to employees of the Executive Branch of the Government by the Hatch Act." Subsequently adopted Canons of Ethics for each type of judicial employee proscribed partisan political activities such as holding office in political organizations, making partisan political speeches, soliciting or contributing funds, or becoming candidates for political office. For each of the positions, except Law Clerks, the Canon has been amended to allow "nonpartisan political activity that does not tend to reflect adversely on the dignity of the court or his office, or interfere with the proper performance of his official duties."[40] The enforcement of these restrictions, however, is left to the discretion of each employing judicial officer rather than to the U.S. Office of Personnel Management's General Counsel. Each judge is responsible for the conduct of his or her employees, who serve at the pleasure and discretion of the judge, in much the same manner that House and Senate staffers serve at the pleasure of the employing member.

Conclusion

The restrictions on the First Amendment right of federal executive branch employees have been in effect by Executive Order and Civil Service Commission Regulation for 76 years and by statute for 44 years. The provisions restricting voluntary partisan political activity have always been controversial, and during the last few years Executive and Congressional opinion, as well as that of the covered employees, seems to have been moving toward a

position favoring repeal of the §9(a) proscription.

In 1974, Congress repealed most of the §9(a) restrictions which, since 1940, had been applied to state and local employees of federally funded programs. At the present time, these employees are now restricted only from : (a) using official authority or influence to interfere with or affect the results of elections; (b) coercing or advising state and local employees to contribute to candidates or parties; and (c) being a candidate for public elective office.[41] During the 94th Congress, the House of Representatives, by a vote of 288-119, and the Senate, by a vote of 47-32, passed differing versions of H.R 8617 which would have removed most of the restrictions on voluntary partisan political activity by federal executive branch employees covered by §9(a) of the Hatch Act. The conference report on the Federal Employees Political Activities Act of 1975 was adopted by the House, 241-164, on March 30, 1976, and by the Senate, 54-36, on March 31, 1976. The legislation was vetoed by President Ford on April 12, and, by a vote of 243-160 on April, 29, the House fell 26 votes short of overriding the veto.[42]

Since the veto, public and official sentiment has been building for relaxation of the restrictions on voluntary political expression and activity. In his message to Congress on March 22, 1977, President Carter states that he favored revision of the Hatch Act to restore the political rights of federal employees not in sensitive positions.[43] On February 26, 1978, the AFL-CIO Executive Council adopted a policy statement supporting revision of the Hatch Act to allow federal employees to engage in political activities, and similar positions were advocated on August 13, 1978, at the ACLU National Convocation on Free Speech.[44]

More recently, in December, 1982, the American Federation of Government Employees, representing many of the covered employees, announced a Hatch Act Reform Drive to restore the First Amendment political rights of its membership. AFGE National President Kenneth T. Blaylock acknowledged the original intent of the Act to protect federal workers, but he said, "the law lingers on the books today as a set of shackles, rather than as a shield . . . . In effect, the Hatch Act is used to keep federal workers out of any public debate about government programs and agency actions. Those who could really make a worthwhile contribution to the argument--the federal workers who know what's going on--are kept out of the dialogue at election time." He contended tht "the public would be better served if federal workers were allowed to make voters aware of agency shortcomings by being able to take part in the election process debate that eventually sets the course for government," and, further, that "more truth about government would come to the public's attention and wiser decisions could be made by the voters."[45]

The Supreme Court has acknowledged that Congress could not prohibit federal employees from joining, holding administrative positions in, contributing to, soliciting funds for, or proselytizing for an established religious denomination, despite the establishment clause of the First Amendment; however, the Court has refused to accept the analogy.[46] Since the constitutional arguments have not prevailed, and since enormous differences are tolerated with regard to political expression within the executive branch and among the various branches of government, perhaps Congress should look to experience to realize that the §9(a) proscrptions go further than reasonably necessary to achieve the ends desired. There has been no evidence of political coercion, partial administration, preferential promotion, or less efficiency as a result of state and local employees of federally funded programs being allowed to exercise their First Amendment rights during the past seven years.

Emerson suggested that the system of freedom of expression could be improved and refined by certain adjustments, such as prohibiting official coercion and intimidation by government employees who might use the public purse and public power to reduce the effectiveness of expression by ordinary citizens, and those provisions of the Hatch Act do not, in the context of this study, raise First Amendment issues of immediate concern. The §9(a)

restrictions, however, do present significant First Amendment problems and unnecessary restrictions on the freedom of expression by government employees in the executive branch of the federal government. Congress should act to repeal these Hatch Act provisions and restore the legitimate and essential First Amendment rights of executive branch employees. Congressman William Clay, Chairman of the Subcommittee on Employee Political Rights and Intergovernmental Programs of the Post Office and Civil Service Committee, has been attempting to do that since 1974. Presently, such legislation is before Congress, and as H.R. 81 and H.R. 82 and enactment could restore those fundamental political rights without increasing the tendency toward the evils sought to be controlled by the original legislation. It is hoped that Congress will soon recognize, as did Mr. Justice Douglas, that "it is of no concern of Government what an employee does in his or her own time, whether religion, recreations, social work, or politics is his hobby--unless what he or she does impairs efficiency or other facets of the merits of his job."[47]

Endnotes

[1]Oklahoma v. United State Civil Service Commission, 330 U.S. 127 at 143 (1947).

[2]William L. Riordon, Plunkett of Tammany Hall (1905, rpt. New York: E.P. Dutton, 1963) p. 11.

[3]Franklyn S. Haiman, Speech and Law in a Free Society (Chicago: University of Chicago Press, 1981), pp. 415-416.

[4]Thomas I. Emerson, The System of Freedom of Expression (New York: Random House, 1970), pp. 697-716, 583.

[5]Emerson, p. 563.

[6]Virginia McMurtry, Hatch Act: Proposed Amendments, (Washington, D.C.: Library of Congress Congressional Research Service, 1982), p. 1.

[7]22 Stat. 403 (1883).

[8]53 Stat. 1147 (1939).

[9]U.S. Cong., Senate, Special Committee on Campaign Expenditures and Use of Government Funds, Investigation of Senatorial Campaign Expenditures, 76th Cong., 1st sess, S. Rept. 76-1 (Washington, D.C.: Government Printing Office, 1939).

[10]See Patricia Ann Fiori, The Hatch Act: Present Text and Statutory History of Provisions (Washington, D.C.: Library of Congress Congressional Research Service, 1978).

[11]5 U.S.C.§§ 7321, 7322, 7324 (a)(1); 18 U.S.C. §§ 594, 595, 598, 600-602, 604-606.

[12]54 Stat. 767 § 15 (1940).

[13]5 C.F.R. § 733.122; United States Office of Personnel Management, Political Activities of Federal Employees (Washington, D.C.: Government Printing Office, 1980).

[14]5 U.S.C. §§ 7322, 7324 (a)(1); 18 U.S.C. §§ 594, 595, 598, 600, 601, 606.

[15]5 U.S.C. § 7324 (d).

[16]5 U.S.C. § 7326; 5 C.F.R. § 733.101 (e).

[17]5 U.S.C. § 7327; United States Civil Service Commission, Federal Employees Political Participation (Washington, D.C.: Government Printing Office, 1972), pp. 7-9; 5 C.F.R. 733.124 (b).

[18]5 U.S.C. § 7327 (b) (2).

[19]Senate Select Committee on Ethics, Interpretive Rulings No. 88 (16 November 1977), No. 5 (11 May 1977), and No. 3 (5 May 1977). For purposes of detail and consistency, reference will be made to Senate rulings. Corresponding and similar provisions for House members and employees can be found in U.S. Cong., House Commitee on Standards of Official Conduct, Ethics Manual for Members and Employees of the U.S. House of Representatives, 96th Cong., 1st sess. (Washington, D.C.: Government Printing Office, 1979), pp. 105-122.

[20]U.S. Cong., Senate, Special Committee on Official Conduct, Establishing a Code of Official Conduct for Members, Officers, and Employees of the United States Senate, 95th Cong., 1st sess., S. Rept. 95-49 (Washington, D.C.: Government Printing Office, 1977).

[21]Congressional Record, 13 March 1977, p. 4334.

[22]U.S. Cong., Senate Committee on Rules and Administration, Amending the Standing Rules of the Senate Relative to Political Fund Activity, 95th Cong., 1st sess, S. Rept. 95-241 (Washington, D.C.: Government Printing Office, 1977), p. 1.

[23]Senate Select Committee on Ethics, Interpretive Ruling No. 263 (12 June 1979).

[24]U.S. Cong., Senate, Committee on Rules and Administration, Senate Election Law Guidebook, 97th Cong., 2d sess., S. Rept. 97-22 (Washington, D.C.: Government Printing Office, 1982), p. 268. Part IV of this report, "Campaign Activities by Senate Employees," prepared by Jack H. Maskell of the American Law Division, Congressional Research Service, Library of Congress, is an excellent summary of appropriate provisions and was relied upon heavily for this section.

[25]18 U.S.C. §§ 602,603.

[26]Congressional Record, 18 December 1979, p. S 19099; 2 U.S.C. § 431 (8)(B)(ii).

[27]Senate Select Committee on Ethics, Interpretive Ruling No. 3 (5 May 1977).

[28]Senate Select Committee on Ethics, Interpretive Ruling No. 22 (26 May 1977).

[29]Senate Select Committee on Ethics, Interpretive Rulings No. 204 (5 December 1978) and No. 182 (29 September 1978).

[30]Senate Select Committee on Ethics, Interpretive Rulings No. 326 (1 July 1980), No. 204 (5 December 1978), No. 55 (7 September 1977), No. 109 (23 March 1978), and Senate Election Law Guidebook, p. 267.

[31]Senate Election Law Guidebook, p. 263.

[32]Senate Election Law Guidebook, p. 254; For criminal actions, however, see United States v. Clark, No. 78-207 (D.W. Pa., 1978), guilty plea 13 Feb. 1979.

[33]Senate Election Law Guidebook, p. 254; United States ex rel Joseph v. Cannon, 642 F. 2d 1373 (D.C. Cir. 1981).

[34]"Canon 7," Code of Judicial Conduct for United States Judges, (Washington, D.C.: Judicial Conference of the United States, 1974), p. 1-43. Most state judges are similarly regulated by Canon 28 of the American Bar Association's Canons of Judicial Ethics, and the state courts have generally upheld such restrictions. See 48A C.J.S. § 37, and 46 Am Jur. § 61. An exception is Louthan v. Commonwealth, 79 Va. 196, which held that a state statute making it unlawful for a judge to make political speeches and participate in political meetings infringed upon his constitutional right to freedom of speech.

[35]Advisory Committee on Judicial Activities, Advisory Opinions No. 32 and No. 42.

[36]Letter from Judge Richard S. Arnold, 22 March 1983. Untitled Resolution enclosed.

[37]Advisory Committee on Judicial Activities, Advisory Opinions No. 62 and No. 53.

[38]Advisory Committee on Judicial Activities, Advisory Opinion No. 62 and Dockets No. 167-170.

[39]Interview with Judge Richard Arnold, Eighth Circuit Court of Appeals, 22 March 1983; U.S. Cong., House, Committee on the Judiciary, William Cummins v. Judge Benjamin Johnson, H. Rept. No. 88, 22d Cong., 2d sess. (1833).

[40]The resolution is discussed and the derivitive Codes of Ethics for United States Clerks and Deputy Clerks, Probation Officers, Staff Attorneys, Circuit Executives, and Law Clerks are found in Guide to Judicial Policies and Procedures (Washington, D.C.: Administrative Office of the United States Courts, 1977), I, Chap.X, pp. J-1-8,K-1-8, K-1-9, L-8, L-9, L-10, M-1-9, M-1-10, N-1-6, and R-8.

[41]88 Stat. 1263 (1974); 5 U.S.C. § 1501 et. seq.; 5 C.F.R. 151.101 et seq.; Patricia Fiori, "Hatch Act" Restrictions on Political Activity by State and Local Government Employees (Washington, D.C.: Library of Congress Congressional Research Service 1976).

[42]U.S. Cong., Conference Committees, Federal Employees' Political Activities Act, H. Rept. 94-943, 94th Cong., 2d sess. (Washington, D.C.: Government Printing Office, 1976); McMurtry, pp. 2-3.

[43]"Election Reform," Weekly Compilation of Presidential Documents, 13, No. 13 (28 March 1977), pp. 430-431.

[44]McMurtry, p. 6. Ralph Brown, A. Ernest Fitzgerald, Victor Gotbaum, Simon Lazarus, John Lindsay, Jean O'Leary, and Ralph J. Temple, "Free Speech in Government Employment," ACLU National Convocation on Free Speech, New York, 13 August 1978.

[45]Kenneth T. Blaylock, "Hatch Act Reform is Necessary to Restore Basic Citizenship Rights," The Government Standard, December 1982, p. 2. It is not, however, contended that support for the restoration of public employee political rights is unanimous. A recent proposal to allow off-duty political activity by municipal employees in Tucson drew opposition from a number of city employees and one of the local newspapers, while the other newspaper supported the measure and called it a "fundamental right." Editorial, "No Campaigning by Employees," Tucson Citizen, 26 April 1983, p. 6A; Editorial, "No Politicking," Tucson Citizen, 7 July 1983, p. 12A; Editorial, "A Fundamental Right," Arizona Daily Star, 9 July 1983, p. 12A.

[46]United Public Workers v. Mitchell, 330 U.S. 75 (1947).

[47]Douglas, J., dissenting in United States Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548 at 597 (1973).

THE SUPREME COURT AND THE FIRST AMENDMENT: 1982-1983

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I. The Emphasis

The Supreme Court in its 1982-83 term took up more cases than at any other time in modern Court history. The key decisions with the most sweeping impact struck down the "legislative veto" power of Congress, outlawed tax breaks for racially discriminatory schools, banned pension plans that discriminated against women, and struck down laws that made abortions difficult to obtain. Noteworthy was the fact that despite a high volume of cases, some with considerable societal impact, the First Amendment received, by comparison with the attention given to women, taxes, and the rights of criminals, scant notice.

The Supreme Court rendered opinions in six essentially First Amendment freedom of expression cases. Three of these extended constitutional protection to speech while the other three gave greater recognition to the requirements of unions and employers. The Court was nearly of one view that a federal law violates the First Amendment by banning expression on the public sidewalks surrounding the U.S. Supreme Court building in U.S. v. Grace, 51 LW 4444. Only Justice Rehnquist, the Court's most conservative member, dissented from holding it unconstitutional to single out the press for differential treatment and thereby target a small group of newspapers for special taxation in Minneapolis Star and Tribune v. Minnesota Commissioner of Revenue, 51 LW 4315. Finally, the Court unanimously struck down a statute which prohibited mailing unsolicited advertisements for contraceptives as it was applied to informational pamphlets discussing venereal disease and family planning in Bolger v. Youngs Drug Products Corporation, 51 LW 4961.

However, the Court's dependably conservative influence supported exclusive, not general, access to teacher mailboxes in Perry Education Assn. v. Perry Local Educators Assn., 51 LW 4165, and authorized restricting an employee's speech when such primarily resembled a grievance concerning internal office policy in Henry Connick v. Sheila Myers, 51 LW 4436. Also, in what Justice Blackmun called a "crabbed and uninformed" interpretation of federal law, the Court declined to provide equal protection and equal privilege for non-union workers to exercise freedom not to associate with a union in Carpenters, Local 610 v. Scott et al., 51 LW 5173.

II. The Alignment

The court alignment of justices remains generally true to form for all case types including those of the First Amendment. In most matters, Justices Sandra Day O'Connor and William Rehnquist can be found with fellow conservative and Chief Justice Warren Burger. Justice Marshall regularly sides with William Brennan, the Court's senior member and leading liberal. The centrist justices whose votes are fought for by the conservative and liberal factions still cast the most crucial votes. As White, Powell, Blackmun, and Stevens switch sides the Court majority is formed. Brennan and Marshall must attract three of these four votes, and most often only Justice Stevens seems inclined to join the liberals. The newest Justice, Sandra Day O'Connor, President Reagan's only appointment to the Court, voted with the near unanimous Court on all three almost automatic decisions which extended First Amendment protection to speech during the recent Court term. On two decisions which left the affected speech unprotected she sided with conservatives Burger and Rehnquist. This First Amendment voting was consistent with her subordination of individual rights to law enforcement when in four such cases she led the Court with Burger and

Rehnquist's support.

III. The Future

While the 1982-83 Court did not expand First Amendment horizons, it could, but likely will not, distinguish itself for the treatment of a case scheduled for argument next term.

In 1970, as the Bose Corporation was enjoying substantial sales in the hi-fi speaker market, Consumer Reports magazine reported that Bose speakers produced sound which grew to "gigantic proportions," violins appeared to be "10 feet wide," and "a piano stretched from wall to wall." The magazine added that the sound "tended to wander about the room." After the review came out the growth of Bose sales fell sharply. Bose sued Consumer Reports for libel; and since 1971, the suit has lingered in the courts. At the trial level for this case (508 F.2d 1249) the magazine lost a libel suit for the first time. However, a federal appeals court (692 F.2d 189) last November reversed the $200,000 judgment by finding the language which described the movement of sound to be "imprecise" rather than knowingly false.

Bose claimed at the trial that the magazine's statement that the sound of instruments "wandered about" the room was "knowingly falsified" because the sound actually wandered only "along" one wall between two Bose speakers, and the magazine's test engineer was too intelligent to use the word "about." Consumer Reports countered that their claim that Bose sound "wandered" was substantially accurate at best and at least a matter of opinion, but not libelous. Bose sales fell, the magazine claimed, not because of the review but because of an economy-related decline in consumer spending on hi-fi equipment.

Resolution of whether sound wandered "about" a room or "along" a wall and whether a critic knowingly misled readers will not cause this case to be widely noted. What will be remembered is its inhibiting influence on criticism by the press and the growth of an obscure dispute into a major test of legal procedure. Indeed, the recent highly publicized huge-damage-award libel trials promise to have far less impact on the press and libel law than will the Bose case.

If liability ensues for expressing subjective opinions as couched in the descriptive language of trained experts, then the critics of products, services, food, movies, etc. are threatened and the nation's press is in serious trouble. Since 1964 (New York Times v. Sullivan, 376 U.S. 254), certain libel plaintiff's have been obligated to prove that the harmful utterance was published with knowledge of its falsity or reckless disregard for its falsity. This so-called New York Times rule attempts to protect honest mistakes, induce expression of opinion, and encourage robust debate while prohibiting only deliberate lying. The question arises, has the Supreme Court accepted the Bose case so that it might revoke the freedom to err innocently, a "breathing-space-right" the press has enjoyed since 1964? This may seem far-fetched but it should be remembered that the appellate court protected the expressed evaluation of the Bose speakers and still the case was granted certiorari by essentially the same Supreme Court which has ruled against the press in every libel case it has decided in the last ten years.

Another aspect to the Bose case is intriguing. When New York Times v. Sullivan extended First Amendment protection to the press in libel cases the Court ruled that in such cases an appeals court could review factual matters, ordinarily reserved for the trial judge or jury to decide, and reverse a trial court decision as a result of this review.

The concern of the press is that the Court has accepted review of the Bose case to limit appellate review of factual situations. To so limit appellate power in First Amendment cases, the press contends, would foster applying different local standards in different parts of the country; and if appellate

review is restricted only to the legal issues certified on appeal, regional differences in treating the facts would go unchecked. National publications would have to adjust their content to satisfy the more intolerant areas of the country.

At the trial level, media defendants lose over 80% of all libel suits brought against them, but they win almost 70% of those which go on to the appellate courts. Appeals courts which review the facts extend protection to the same "imprecise statements of fact" or "statements of opinion" which local judges and juries interpret as reckless disregard for the truth.

Thus the Bose case can be used by the Supreme Court to restate, reduce, or eliminate First Amendment protection for the press established in New York Times v. Sullivan. Indeed, the press should be profoundly concerned since Justices Rehnquist and White have already indicated appellate review of certain libel cases should be reduced.

IV. The Opinions Rendered

United States v. Mary Grace, et al. (51 LW 4444)*

On the sidewalk in front of the Supreme Court, Mary Grace and Thaddeus Zywicki in separate incidents were threatened with arrest for violation of Title 40, section 13K of the U.S. Code which prohibits "display of any flag, banner, or device designed or adapted to bring into public notice any party, organization, or movement" in or near the grounds of the United States Supreme Court building. The "grounds" have been interpreted to include the public sidewalks as the outer boundaries.

Zywicki sought to distribute handbills concerning the oppression of people in Central America, and Grace began to display a sign on which was inscribed the verbatim text of the First Amendment. On being informed that if they persisted in violation of section 13K they would be arrested, both left. Later they filed suit seeking an injunction against enforcement of section 13K and a declaratory judgment that the statute was unconstitutional on its face. The Federal District Court dismissed the suit but on appeal the Court of Appeals struck down section 13K as an unconstitutional restriction on First Amendment rights in a public place. The government appealed to the Supreme Court.

Justice White delivered the opinion of a unanimous court although Justices Marshall and Stevens concurred only in part. White cited precedent and noted that peaceful picketing and leafletting are the kinds of expressive activities which receive First Amendment protection; and such expression can be freely exercised in public places "such as streets, sidewalks, and parks," which are legitimately public forums. The government, he held, in a limited way can restrict such expressive conduct only through regulations which "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." In particular, White concluded, an absolute prohibition on a particular type of expression can be upheld only "if narrowly drawn to accomplish a compelling government interest." White found no "compelling government interest" served merely because sidewalks, traditionally public forum property, abut government property which is not dedicated as a forum for public expression; and the authority to define the Supreme Court grounds does not carry with it the authority to destroy the public forum status of sidewalks. While the Court grounds are not transformed into public-forum-property because the public may enter and leave the grounds, the perimeter sidewalks are indistinguishable from others in Washington, D.C. and thus are public forums for First Amendment purposes.

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*Official U.S. case citations for the 1982-1983 Supreme Court term do not appear because they are assigned subsequent to the preparation of this review.

White regarded section 13K as inappropriately applied in meeting its intent to provide for maintaining law and order on the Court grounds. Since all public sidewalks are to be treated alike, section 13K can do nothing special to protect the Court from appearing to the public that it regards picketing or marching as unacceptable ways to influence the Court.

Justice Marshall dissented in part because he felt "excising sidewalks" does not make section 13K compatible with the First Amendment. The public should not lose their freedom once they cross the sidewalk; and the statute's constitutionality should not have been decided in a piecemeal way, Marshall contended. He would not leave visitors to this Court "subject to the continuing threat of imprisonment if they dare to exercise their First Amendment rights once inside the sidewalks."

Minneapolis Star & Trib. v. Minn. Commissioner of Revenue (51 LW 4315)

Minnesota exempts periodic publications from general sales and use taxes but imposes a "use tax" on the cost of paper and ink products. The first $100,000 worth of paper and ink used in any calendar year is exempt from the tax. The Star Tribune brought suit for a refund of the tax paid on ink and paper claiming that the tax is facially discriminatory and thus violates free press guarantees of the First Amendment.

The Minnesota Supreme Court upheld the tax, but on appeal the United States Supreme Court reversed. Justice O'Connor delivered the opinion of the Court from which Justice Rehnquist dissented.

O'Connor found that Minnesota through this special tax had singled out the press for special treatment and targeted the tax to affect a small group of newspapers. The effect of the $100,000 exemption meant that since only a few would pay any significant amount of tax this presents such a potential for abuse by the state that no interest Minnesota might claim could justify the discriminatory scheme. O'Connor stressed that through manipulating crippling taxes the legislature could operate as a censor to check critical comment by the press; and furthermore, "differential treatment . . . suggests that the goal of the regulation is not unrelated to suppression of expression, and such goal is presumptively unconstitutional."

O'Connor concluded that "a tax that singles out the press, or that targets individual publications within the press, places a heavy burden on the State to justify its action." Since Minnesota offered no such justification for its tax on ink and paper, the tax violated the Star Tribune's free press guarantees.

Justice Rehnquist dissented by doubting that the framers of the First Amendment would have intended the result reached by the Court.

Perry Education Assn. v. Perry Local Educators Assn. (51 LW 4165)

The Board of Education of Perry Township, Indiana, and the Perry Education Association (PEA) entered into a collective bargaining agreement wherein PEA as the exclusive bargaining agent for the school district's teachers was granted access to the inter-school mail system and teacher mailboxes in the township schools. Under the agreement access to mail facilities was not available to any rival union such as the Perry Local Educator's Association (PLEA). PLEA brought action against PEA and the Board contending preferential access to the internal mail system violated PLEA's First Amendment rights. A federal appellate court agreed and PEA appealed to the U.S. Supreme Court.

The primary question certified for review was "whether the First Amendment is violated when a union that has been elected by public school teachers as their exclusive bargaining representative is granted access to certain means of communication while such access is denied to a rival union"?

Justice White delivered the opinion of a divided Court which reversed the appellate court and supported PEA's right to exclusive use of the mail system. White held that public property not traditionally a forum for public communication may have its speech regulated providing such is reasonable and "not an effort to suppress expression merely because public officials oppose the speaker's view." The mail facilities were not even a limited public forum despite their use by civic and church organizations and by PLEA before PEA became the teacher's exclusive bargaining agent.

White stressed that PLEA has no official responsibility and no entitlement to the same rights of access to school mailboxes as required for PEA to perform PEA's statutory obligations as an exclusive representative of all Perry teachers. White concluded that alternative communication channels remain open to PLEA which is further assured of equal access to all modes of communication while an election to determine a bargaining representative is in progress.

Justices Brennan, Marshall, Powell, and Stevens in a lengthy dissent contended that the case should not involve an "absolute" but an "equal" access claim. It should not turn, they claimed, on whether the mail system is a public forum but on whether the First Amendment permits censorship in any forum. In this forum PEA's exclusive access to an effective channel of communication infringed Plea's First Amendment rights.

Harry Connick v. Sheila Myers (51 LW 4436)

Harry Connick, District Attorney in New Orleans, informed Sheila Myers an Assistant District Attorney, that she would be transferred to prosecute cases in a different section of the criminal court. Myers expressed strong opposition to the transfer and prepared and circulated to other resident district attorneys a questionnaire which solicited their views concerning transfer policy, office morale, pressure to work in political campaigns, confidence in supervisors, etc.

Connick told Myers that he considered the questionnaire an act of insubordination and that he was terminating her for refusal to accept the transfer. Myers sued in Federal District Court alleging she was wrongfully terminated for exercising her constitutionally protected right of free speech. The District Court found that the questionnaire, not the refusal to accept the transfer, was the real reason for her termination. Since the questionnaire involved matters of public concern and since the State had not "clearly demonstrated" that the questionnaire interfered with the operation of Connick's office, Myers was ordered reinstated in her job. The Court of Appeals affirmed the District Court, and the United States Supreme Court reversed the lower courts by finding that Myer's discharge did not violate the First Amendment.

Justice White delivered the opinion of a divided Court with Justices Brennan, Marshall, Blackmun, and Stevens dissenting. The problem was to arrive at "a balance between the interests of the employee, as a citizen, in commenting on matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." White held that a federal court is not the appropriate forum to review the wisdom of a personnel decision made by a public agency about an employee who speaks not as a citizen but as an employee about matters of personal interest.

The burden on the State, according to White, was too great and a "clear demonstration" that speech "substantially interfered" with the operation of the office was not required. Connick did not have to tolerate action that he reasonably believed would disrupt the office, undermine his authority, and destroy office relationships. The questions posed in the questionnaire did not constitute sufficient matters of "public concern," and the exercise of the speech act in distributing them entitled Connick to fear that the functioning of his office was endangered.

Justice Brennan's dissent lamented that out of fear of dismissal public employees now will be deterred from making critical statements about how public agencies conduct their business. Valuable information with which to evaluate

the performance of elected officials will be unavailable. Brennan concluded that protection of the dissemination of such information is an "essential function of the First Amendment."

Bolger, et al. v. Youngs Drug Products Corp. (51 LW 4961)

Title 39 of the U.S. Code prohibits unsolicited advertisements for contraceptives. The Postal Service notified a contraceptive manufacturer that unsolicited advertisements promoting its products and discussing venereal disease and family planning violated federal law. The manufacturer challenged the Postal Service ruling and a Federal District Court provided relief by holding that Title 39 as applied to the proposed mailings violated the First Amendment.

Justice Marshall delivered the opinion of a unanimous court which differed only in the reasoning used to reach the same result. Marshall found the mailings to be economically-motivated commercial speech but nevertheless implicative of "substantial individual and societal interests" worthy of protection from unwarranted governmental interference. Marshall's analysis relied upon findings in Central Judson Gas and Electric Corporation v. Public Service Commission, 447 U.S. 563, which protected commercial speech when it concerned lawful information which was not misleading and when the government interest in regulation was more extensive than necessary to serve that interest. Youngs' commercial speech deserved protection because it conveyed "truthful information relevant to important social issues such as family planning and the prevention of venereal disease." The government's dependence on Title 39 to shield people from mail which they might find offensive and to help parents control the manner in which children become informed about birth control is insufficient to justify a sweeping prohibition on the mailing of unsolicited contraceptive advertisements.

Marshall concluded that recipients of objectionable mailings may "avoid the bombardment of their sensibilities by averting their eyes" or accepting the burden of "the short journey from mail box to trash can." This he found preferable to "reducing the adult population to reading only what is fit for children." Further, Title 39 is defective because it "denies to parents truthful information bearing on their ability to discuss birth control and make informed decisions in this area."

Carpenters Local 610 v. Scott et al. (51 LW 5173)

When a Texas-based construction company hired non-union workers, a local building and construction union organized a construction site protest. The protest turned violent and company employees were beaten and equipment was burned and destroyed. The violence and vandalism delayed construction causing the company to default on its contract. Scott alleged that the union had conspired to deprive non-union workers of their right not to associate with a union as protected by 42 U.S.C. sect. 1985 (3).

The lower federal courts agreed with Scott and held that for purposes of sect. 1985(3) some state infringement of First Amendment rights need not be shown; and the statute covers conspiracies "motivated by political or economic bias as well as those motivated by racial bias, thus including the conspiracy to harm the non-union employees of the union contractor."

In a 5-4 decision delivered by Justice White, the Supreme Court reversed the lower courts and held in effect that sect. 1985(3), the so-called Ku Klux Klan Act, provides no protection against all violence intended to intimidate persons by conspiracy from exercising their legal rights. Section 1985(3), White contended, prohibits a private conspiracy only when some state action interferes with the exercise of First Amendment rights. Without proof of state involvement, a case for violation of First Amendment rights is not made since protection against Congress or the states (by virtue of the Fourteenth Amendment) abridging freedom of speech by making laws is not required when the state is not involved.

Justice Bluckmun, joined by Brennan, Marshall, and O'Connor interpreted

sect. 1985(3) differently from the Court majority. The dissent claimed that Congress took the view that faced with a conspiracy toward a class of persons, the possibility of ineffective state enforcement was sufficient to support federal intervention. Blackmun interpreted the intent of Congress through sect. 1985(3) to be a remedy "to any class of persons, whose beliefs or associations placed them in danger of not receiving equal protection of the laws from local authorities." Blackmun concluded that while certain traits such as race, religion, sex, and national origin per se meet this requirement so must non-union association.

V. Cases Disposed Without Hearings

(The Supreme Court took action which in each of the following cases resulted in allowing the holding of the lower court to prevail except in those instances that are noted otherwise.)

Armed Forces

Lower Court: An Air Force base commander who denied an anti-arms-group the right to participate in an "open house" did not violate the First Amendment. Issues: Where a military base is opened to the general public and non-military speakers are invited to communicate messages not directly related to the purpose of the "open house," may the message of a dissident group be excluded because of its content or viewpoint? By opening the base was a temporary public forum created so that only compelling governmental interest could justify excluding the message? Certiorari denied. People for Free Speech at SAC v. U.S. Air Force, 675 F2d 1010, 51 LW 3262.

Constitutional Law

Lower court: A school board rule banning hand-carried signs, placards, or posters in school board office buildings is a reasonable time, place, and manner restriction on speech. Issue: Does the First Amendment prohibit a ban on hand-carried signs at public meetings of a school board? Appeal dismissed. Godwin v. Ease Baton Rouge Parish School Board, 408 So2d 1214, 51 LW 3015.

Lower court: An airport regulation permitting organizations to distribute literature and solicit funds outside but not inside terminal buildings is overbroad and unconstitutional. Issues: Providing freedom of speech unrelated to money solicitation is not restricted, may a city ordinance confine charitable fund solicitation to sidewalks adjacent to an airport terminal? Is a terminal area, totally leased to an airline carrier, a "public forum" subject to First Amendment rights? Does a law result in unconstitutional prior-restraint when it (1) requires a permit identifying the applicant and the purpose for fund solicitation; (2) requires a small fee to defray costs; (3) provides reasons for permit refusal or cancellation; and (4) regulates time, location, manner, and number of solicitors? Dismissed by agreement of the parties. Limmer v. Fernandes, 663 F2d 619, 51 LW 3049.

Defamation

Lower court: An amendment to the Comprehensive Employment Training Act (CETA) that prohibits participation in CETA programs by persons who publicly advocate violent overthrow of the federal government violates the First Amendment. Issue: Does the amendment violate the constitution when it is interpreted by the Secretary of Labor to apply only where such advocacy is diverted to "inciting or producing imminent lawless action and is likely to incite or

produce such action"? Judgment vacated. Donovan v. Blitz, 538 FSupp 1119, 51 LW 3425.

Mass Media

Lower court: The refusal of a newspaper to run rental information advertising was not based on inherently deceptive practice by the advertiser, served no legitimate purpose, and tended to destroy competition. Issue: Does the First Amendment dictate that a newspaper at its discretion can refuse to publish advertisements that it believes in good faith to be unacceptable? Certiorari denied. Providence Journal Co. v. Home Replacement Service, Inc., 51 LW 3268.

Lower court: A Florida statute imposed unconstitutional prior restraint. Issue: Does a Florida statute which prohibits truthful publication of the identity of a person who has been wiretapped, but not yet indicted, violate freedom of the press? Certiorari denied. Gardner v. Bradenton Herald, Inc., 51 LW 3211.

Municipalities

Lower court: A ban on nude and semi-nude entertainment where alcoholic beverages are sold does not violate the First Amendment because any threat to protected expression is justified by the high incidence of criminality associated with such activity. Issue: Does a ban on non-obscene nude dancing in an establishment where alcoholic beverages are sold violate the First Amendment? Certiorari denied. Grand Faloon Tavern Inc. v. Wicker, 51 LW 3176.

Lower court: A string band that marches in a city parade and prepares a thematic arrangement is expressive entertainment covered by First Amendment free speech guarantees. The case was remanded to a district court to determine if a city rule limiting the number of bands in a parade is the least restrictive means to shorten a parade. Issue: Where rules are "content neutral," serve legitimate and substantial governmental interest, and do not affect a band's right to expression at any other time, place, or manner, does a limitation on the number of participants violate the First Amendment? Certiorari denied. City of Philadelphia v. Tacynec, 687 F2d 793, 51 LW 3555.

Lower court: A municipal ordinance which almost totally bans freestanding signs and limits the size and height of facade signs is constitutional as applied to commercial speech. Issues: Does a municipal ordinance unconstitutionally interfere with freedom of speech by requiring removal of on-site freestanding business identification signs, by discriminating against certain non-commercial and commercial speech, and by affording preferential treatment to certain users? Appeal dismissed. Syracuse Savings Bank v. Town of DeWitt, 51 LW 3202.

Obscenity

Issues: Is the Texas Penal Code invalid for vagueness because it fails to state when sexual conduct it describes becomes patently offensive? Does the court err when it sustains a conviction after the defendant was charged with exhibiting only two of three films seized and the third was not exhibited at the trial? Appeal dismissed. Goocher v. Texas, 51 LW 3101.

Lower court: The Ohio obscenity laws as construed by the Ohio Supreme Court are in accord with Miller v. California, 413 U.S. 15 (1973), requirements; and when read in their entirety, they are not too vague and overbroad. Issue: Are Ohio's criminal obscenity statutes, as construed, unconstitutional under the First Amendment? Certiorari denied. Turoso v. Cleveland Municipal Court, 674 F2d 486, 51 LW 3102. See also: Sovereign News Co. v. Corrigan, 51 LW 3104.

Lower court: An individual may be convicted for promoting or advertising materials as obscene irrespective of whether the materials are in fact obscene. There is no error in denying admission of the advertised materials into evidence even though the convictions related to the advertised materials. Issue: Can a conviction be upheld when it rests on the advertisement of material which is not found obscene as promoted in an advertisement which is not obscene? Certiorari denied. Jewell Productions, Inc. v. California, 51 LW 3706.

Schools

Issue: May a state university by imposing regulations control commercial speech (e.g. dissemination of price and credit information) to students in its dormitories in order to provide a proper study atmosphere and protect student privacy? The lower court found this control in violation of the First Amendment. Dismissed by mutual agreement of the parties. Pennsylvania State University v. American Future Systems, Inc., 51 LW 3399.

Lower court: Submission of a professor's free speech infringement case to a jury was precluded by (1) evidence that the department chairman was dissatisfied with the probationary professor's work prior to free speech incidents which caused the professor to claim retaliatory denial of tenure and (2) that the chairman only "possibly knew" that the professor was critical about the department. Issue: Did the court err by requiring the professor to prove not only that speech protected by the First Amendment caused denial of tenure but that he would have been granted tenure in the absence of that speech? Certiorari denied. Mayberry v. Dees, 663 F2d 502, 51 LW 3083.

Issue: Does a school board regulation which prohibits the tape recording of executive sessions of the board violate the First Amendment? The lower court found no violation. Certiorari denied. Dean v. St. Bernard Parish School Board, 51 LW 3448.

States

Issue: Does a Ohio Liquor Control Commission regulation which prohibits a licensed retailer from advertising liquor prices violate the First Amendment? Appeal dismissed. Queensgate Investment Co. v. Ohio Liquor Control Commission, 51 LW 3081.

Taxation

Lower court: A "use" tax imposed on customer catalogs shipped from an out-of-state printer to a department store chain's instate stores does not violate the First Amendment. Issues: Is a "use" tax on catalogs unconstitutional because it taxes the exercise of First Amendment rights? Does the state have a sufficiently substantial governmental interest to justify, through taxation, infringement of commercial speech? Since such a tax could be applied to fully protected non-commercial speech, should it be struck down as overbroad and hence unconstitutional? Appeal dismissed. Sears Roebuck & Company v. State of Washington, 643 P2d 884, 51 LW 3188.

THE BIRTH OF A BABY PHOTO ESSAY: WAS IT OBSCENITY OR CENSORSHIP?

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In photographing what many would say is one of the most beautiful moments anyone can experience, Brian Lanker earned the Pulitzer Prize for feature photography in 1973. His subject was the birth of a baby.[1] This wasn't the first time a baby's birth had been photographed for publication. Life magazine did this thirty-five years prior to Lanker's efforts. But rather than meeting with widespread praise and receiving a prestigious prize for photojournalism, Life magazine was condemned and confiscated by local police in several cities across the country. Estimates of the number of communities taking action against what was then thought to be an "obscene" publication range from thirty-three[2] to sixty.[3] Whatever the exact number, one fact remains clear, the publication of this photo essay in the April 11, 1938 issue of Life led to a widespread attempt at censorship by many local authorities that was at times successful, and at times doomed to failure.

This study is an attempt to piece together the issues involved and to present an overall picture of the assault against this one issue of Life. Contemporary news accounts from several cities where this issue came under fire by local authorities will be examined. This examination includes news accounts from newspapers published in New York, Boston, Chicago, St. Louis, New Orleans, and Memphis. In addition to these news accounts, this study will also examine the court opinion written when the publisher of Life was charged with publishing an "obscene" publication.

The 1930's

To understand better the attitudes on this issue and the actions taken against Life, it might be helpful to recall that life in the 1930's was unique in several ways. It was a period marked by a communications boom. Such things as the first technicolor motion picture were produced at this time. Major photography magazines such as Life and Look were founded in the late 1930's, and major advances were made in the transmission of news photography by radio and wire. In short, the 1930's was a period when the nation became image conscious.[4]

The 1930's was also a time when movie attendance was at a high level with as many as eighty-five million people going to the cinema each week. What the audience saw at the movies was often a sanitized version of life. For example, in 1934 the Catholic League of Decency started to see that films avoided long kisses, adultery, nude babies, or married couples sleeping in anything but twin beds. And "when Dennis King sang 'to Hell with Burgundy,' a thrill ran through the audiences, as though a naked woman had run among them."[5]

One film that became involved in the clash between Life and local authorities also had its beginning in the mid-1930's. Produced by the American Committee on Maternal Welfare and sponsored by sixteen medical and social service societies, The Birth of a Baby was favorably previewed by a majority of 12,000 doctors and clubwomen. The climax of this seventy-two minute film, which followed a woman's life during pregnancy, was the actual birth of a baby.[6]

> For one breathless minute the camera, with its matchless eye for detail, watches the child's head emerge as the physician moves swiftly to support it, notes an infant arm fling heavenward as it comes into view, shows the physician delivering the child at last from its laboring mother.[7]

A main reason for the film being produced was to help reduce death and sickness among mothers and children through education. The death rate of mothers and babies in birth was high, estimated at a yearly toll of 150,000 lives.[8]

Several stills from this motion picture eventually found their way into Life as a part of a special photo essay on the subject of birth. This particular essay was only one of a long series of medically related photo features that Life had run early in its career. From 1936 to 1938 several photo features on such topics as epilepsy, syphilis, nursing, socialized medicine, X-rays, tuberculosis, and pneumonia had appeared in Life. In the issue dated April 11, 1938, Life continued its medical series with a four page spread of thirty-five pictures from the film The Birth of a Baby, plus two anatomical diagrams. There was no nudity or unnecessary disclosure in the entire feature.[9]

The publishers of Life knew that this particular photo essay could be a cause of concern for some people, so they took the precaution of notifying their 650,000 subscribers in advance of publication by sending them a letter detailing both the content and purpose of the upcoming essay. It was also pointed out in this notice that the photo feature would be printed on the middle pages of the magazine, so that it could be easily removed by family censors. In addition, the magazine's print order for this particular issue was held at the previous week's level of 2,040,000.[10] These actions by Life indicated that the magazine knew the potential of the photo essay.[11] By the time the entire episode was over, it was estimated that 17,000,000 people had seen the issue, with sixty-one percent of the public surveyed saying that they approved of this method of teaching the public about childbirth and the care of mothers.[12]

Banned in Boston

Although a majority of Americans may have favored this photo essay, a small but effective minority in many parts of the country was successful in limiting the distribution of this issue despite the fact that the magazine was cleared for mailing by the U.S. Post Office.[13] The first move against Life came in Boston and the surrounding area. Boston Police Commissioner Joseph F. Timilty was concerned about the distribution of obscene literature in his territory. In Boston during February and March of 1938, Timilty received agreement among magazine distributors to ban obscene literature. The result was that thirty-five detective, picture, and other magazines with a combined circulation of 1,000,000 copies had been banned from news stands and cigar stores. Although Timilty had no legal power to set himself up as the censor in Boston, or any other area, he could get warrants for the arrest of people distributing obscene literature. Because of this threat news distributors generally cooperated with Timilty by submitting questionable publications to Timility's Board of Censors. This board consisted of Edward W. Fallon, superintendent of police; Capt. Charles F. Eldridge; and Augustine J. Gill, police secretary.[14]

In an effort to extend his censorship powers to other areas outside of Boston, Timilty arranged for a meeting of 107 magazine distributors from six New England states to discuss the issue of obscene literature. After addressing the meeting, which was held in Boston police headquarters, Timilty left the gathering so that the distributors could decide what, if anything, they could do about this issue. When the meeting adjourned the distributors had agreed to a plan whereby a censorship committee of three distributors would be empowered to ban any magazine or periodical from New England on the grounds that it was salacious, obscene or immoral. The distributors agreed to suppress any publication that this board felt was unfit. And in the case of a dispute, the board would submit the issue to Timilty, whose decision would be final.[15]

The first test of this new method of voluntary censorship came when the distributors' censorship committee ruled that the four-page spread in Life magazine should be torn out before it was sold on the newstands. This issue was shown to Timilty who said that the photographs under question were unsuitable for general distribution.[16] If the ruling of the censorship committee was

followed, then all newsdealers in New England would not sell this issue of Life with the "Birth of a Baby" photo feature still intact. At first it appeared that this plan was working. Boston newsdealers withheld the magazine from the newsstands for a day while some other newsdealers agreed to tear the four page photo feature from the magazine before it was offered for sale. Meanwhile, reports from New Hampshire indicated that all copies of the magazine were taken off the newstands by order of the manager of the affected news agency.[17]

In Pittsfield, Mass., the first city to ban Life, Police Chief John L. Sullivan ordered the magazine to be kept from the newsstands. Sullivan called the photographs "muffled propaganda on birth control." He added that "publication of such material hurts what the churches are trying to build up--modesty and virtue."[18] In Boston an employee of a Back Bay newsstand, Morris Baratz, received a summons for selling a copy of Life to a police detective.[19] One distributor in Boston was convicted and fined $500 for selling a copy of the magazine.[20] Meanwhile, Timilty moved on to other publications, announcing on April 10, 1938, that he would ban a magazine that contained "photographs of unclad women." This action raised the number of magazines banned in Boston to forty-two in two months. Timilty also used this announcement to restate his determination to "protect the children and decent minded people of Boston from the filth that has been filling some magazines."[21]

In response to the proposed ban of Life in Boston and nine other New England cities Life publisher Roy E. Larsen said that the purpose of the photo feature was to educate people in an attempt to help reduce the mortality rate among women and their children during childbirth. In response to Larsen's statement, Joseph F. Lamb, State Department of Knights of Columbus, demanded the recall of the issue on "every ground of decency and morality."[22]

One day later, Larsen issued another statement on the banning of Life in Boston and other areas. Part of the statement said,

> Local police chiefs and in some instances desk sergeants in several New England cities, with doubtful authority, have set their own opinions of the value of Life's "Birth of a Baby" article against the endorsement of national authorities in the fields of education, health, and child welfare. . . . We have no intention whatever of removing the four pages from Life containing the "Birth of a Baby" story and are planning to initiate court action in cities when local censorship has banned distribution of the complete issue of Life.[23]

Other voices heard in oppositon to the ban on Life included that of Rev. William G. Stidger, pastor of the Copely Episcopal Church. He said that he was shocked by the ban on the photographs in Boston. Copely added,

> It's a matter of bunk on the part of a group of stupid, narrow minded police commissioners and censors. Birth is the greatest experience in life, and I see nothing indecent in pictures of that experience. Life's effort is admirable and the magazine is living up to its name.[24]

Despite the actions taken by New England authorities, Life was still available to many readers. Even in Boston the issue was being sold intact by several newsstands. John Tracy of the New England News Company was told by his New York office to offer the magazine to the general public as usual because it was felt that the pictures were educational and could not be considered immoral.[25] And in New Haven, Connecticut City Court Judge Thomas C. Sullivan lifted a police ban on the issue saying, "there is nothing contained in this magazine which could be construed as obscene."[26]

St. Louis Police Seize Life

Censorship of Life's photo essay was not confined to the New England area. Another major effort against the magazine occurred in St. Louis. Following a declaration by St. Louis Prosecuting Attorney James P. Finnegan that the photographs were obscene, police were ordered to seize any issue appearing on newsstands in the city. John E. Rogan, manager of the St. Louis News Co., local distributor of Life, said that 12,000 copies of the magazine were distributed to 500 local dealers early on April 8. But by the time the police started their confiscation of the issue at 3:30 p.m., only 2,857 copies were left. Rogan was arrested on April 8 at Finnegan's direction and then released on $500 bond. Rogan was charged selling and offering for sale indecent and immoral matter, a crime that had a maximum penality of one year in the workhouse and a $1,000 fine. Finnegan said that he took this action after receiving complaints from three church groups and several women who refused to give their names.[27]

Protest about the police action was lodged in an editorial by the St. Louis Post-Dispatch. The editorial said in part,

> The protests [against the photo feature] were to have been expected. But if the picture series brings enlightenment that saves the life of only one mother, the controversy will have been paid for.
>
> The action in St. Louis is particularly regrettable. It goes against the city's long-standing tradition of tolerance, and freedom of expression. The authorities are placed in a dubious light by the fact that this honest constructive effort has been suppressed, while dozens of magazines that specialize in suggestiveness or downright filth continue to be sold freely by the newsstands.[28]

In another complaint against the seizure of Life, the St. Louis Civil Liberties Committee sent a letter of protest to Finnegan. The committee said, "In our opinion, these pictures do not constitute an offense against public decency or morals. Censorship of any kind is contrary to the tradition of St. Louis. Your action smacks of a self-appointed censorship in defiance of this spirit and tradition."[29] Added to this list of criticisms of Finnegan's actions was the comment from a St. Louis minister, Truman B. Douglass, pastor of the Pilgrim Congregational Church. He said that the seizure of the magazine showed that "puritan prurience now reaches the ultimate by asserting it indecent to be born."[30]

Finnegan responded to this criticism by pointing out that while he had received only three protests of his actions, more than 100 other letters and calls of support for his efforts were sent to him. Finnegan added that he doubted the educational or intellectual value of the photographs. He also said that he would not want his children to see them. Pictures like these, Finnegan said, belong in medical publications.[31] In addition to issuing a defense of his actions, Finnegan ordered that all but fifty-copies of Life be returned to Rogan. Rogan had agreed that he would not sell the issue in Missouri and that he would seek to withdraw any other issue of Life that might still be on an area newsstands.[32]

Memphis Moves Against Birth Photos

Another ruling that the Life photographs were obscene led to the magazine's confiscation in Memphis, Tennessee. Using an advisory opinion from the Memphis City Attorney Will Gerber that the pictures violated city and state obscenity laws, Memphis Commissioner of Public Safety Clifford Davis ordered the police to seize all issues of Life that were to be offered for sale. But Davis did not stop there. He also contacted the local distributor of Life, S.M. Haney of the Memphis News Co., and told Haney of the order before the magazine was even distributed to area news dealers. Davis said that, "Mr.

Haney was co-operative, and saved the police a great deal of work." Haney told Davis that no copy of Life would be distributed. Haney later said that he had no idea if the photographs would be torn out of the magazine and the remainder of the issue sold at area newsstands. "I have received no instructions from the company," Haney said.[33]

In his opinion on the birth photographs, Memphis City Attorney Gerber said that the photographs were offensive, and "something that delicacy, purity, and decency forbid to be exposed." He added that Webster's Dictionary defined obscenity as something "offensive to chastity or modesty, expressing or presenting to the mind something that delicacy, purity, and decency forbid to be exposed." Punishment for a violation of the city's obscenity code carried a maximum of a $50 fine for each offense. Violation of the state code on obscenity carried a maximum punishment of one year in a county jail or workhouse and/or a $1,000 fine. In responding to Gerber's opinion, Commissioner Davis said, "I am glad to see him take this legal position. The relationship of parenthood with respect to childbirth is a most sacred institution and even nature itself has always protected conception and delivery."[34]

Haney said that he accepted the city's ban as a matter of necessity. Haney added that he received many calls on the subject. "A number [of calls] were from people who wanted me to sell them copies secretly," Haney said, "offering as high as $1 a copy and assuring me they wouldn't 'snitch' to the police."[35]

Support for the city's ban came from some members of the Memphis and Shelby County Medical Society. The group issued a statement which said in part,

> Whereas the material presented is scientific, and from our viewpoint not obscene, it is doubtful whether the object that the publishers state they wish to obtain can best be accomplished by this particular kind of publicity. If the publication could be sent through the mail, so that it might be censored by those who take exception to it, and not be open to sale without restriction, it might well accomplish some good.[36]

The April 11 issue of Life finally made its way onto newsstands in Memphis, but only in censored form. The four page photo feature on the birth of a baby was torn from the magazines sold on the streets.[37]

Other Areas Ban Life

Just as Memphis moved against Life, so too did other cities. In Chicago Lt. Harry M. Costello of the Chicago Police Crime Prevention Bureau ordered the issue to be taken off the newsstands. Costello said the magazine could only be sold if the four page photo feature was removed. He added that newsstands violating his rule would lose their licenses. News store proprietors who refused to comply with costello's order were told that they would be arrested.[38] The ban was lifted on the following day by Police Commissioner Allman. He said that the restriction was only temporary and that the ban was lifted after police officials determined that the magazine did not violate any city ordinances.[39]

Mayor Maestri of New Orleans also ordered that all copies of Life offered for sale at local newsstands and news stores be seized. An 1884 statute was used as justification for this action. It is interesting to note that although a ban was undertaken against Life in New Orleans, the New Orleans Times-Picayune carried no mention at all of the ban. One reason for this omission can perhaps be seen in a small editorial appearing in the April 9, 1938, issue of the Times-Picayune. The newspaper, while not mentioning Life by name, said that a national magazine had set out to get the widest possible publicity for what the magazine considered to be a daring article. The Times-Picayune said that a publicity buildup was needed because the material itself was actually overplayed in its representation as a daring item. The paper said that other material that is far bolder lies on the shelves collecting dust. For the buildup to be really effective, the editorial continued, "the bait has to be disguised, the rubber

frog painted as a leaping devil that will hurdle the morals of the community and corrupt the commoners." This publicity then leads police and other authorities to "impose a censorship, and the financial returns are immense." Few people, the editorial said, think that this material helps anyone while it disgusts many.[40]

Other reports of cities and even a state banning Life include rather divergent areas of the country. For example, the magazine was banned in Newport, Virginia, by Police Chief W.E. Mahone. Governor George F. Earle banned the magazine in the entire state of Pennsylvania because of the birth photographs. And the issue was banned in Atlantic City, New Jersey. In Tucson, Arizona, the only far western city to ban the issue, the publisher of the Arizona Star sold twenty-five copies of the magazine openly over his own counter in defiance of the police ban.[42] In Miami, Florida, a ban on the sale of the magazine was lifted after the Dade County Medical Association endorsed the photo feature. In contrast, police in Baton Rouge, Louisiana seized all available copies of the magazine, saying that it was objectionable because of the birth photographs. An effort by the police chief in Little Rock, Arkansas, to obtain an issue of Life after banning its sale at noon on April 8, 1938 proved futile. By the time he got to the newsstands to buy a copy of Life to decide for himself on the status of the pictures, the police chief found that the magazine was sold out. And a ban that was imposed in Syracuse, New York, was lifted on Apil 8. Other cities banning the magazine included Birmingham, Alabama, and Gulfport, Mississippi.[43]

Banned in the Bronx

Although the list of cities banning Life is long, perhaps the most interesting story in Life's battle with the censors can be found in the conflict between Bronx City Attorney Samuel J. Foley and Roy E. Larsen, the publisher of Life. The confrontation began when Foley declared that the birth photographs were "an outrageous affront to decency." The police, operating with Foley, confiscated 1,000 copies of the magazine in the Bronx in one afternoon. Four newsdealers were also arrested for selling licentious literature. Later in the day, Foley said that he wished to avoid as many arrests as possible, and urged local news dealers to surrender voluntarily copies of the magazine. In a public statement, Foley said,

> I think it [the publication of the birth photographs] is an outrageous affront to decency and an unmistakable violation of the law. It is not in any sense a borderline case. If they like to fight it out in this county as they are reported ready to do, I will be delighted to have the editor, the publisher, and owner come up here and sell me a copy of it, so that I might try it out on them instead of on some newsdealer.[44]

At about this same time, Life was also banned in other areas of New York and New Jersey. Essex, Bergen, Hudson, Union, and Mercer counties in New York moved to suppress the issue. Nassau District Attorney Edward J. Neary ordered the county and village police to seize all copies of the magazine that were placed on sale pending a presentation of the issue before a grand jury.[45] The Nassau County grand jury handed down an opinion one week later, saying that "as a matter of public policy, education on the subject presented is highly desirable, but that the printing of such matter should not be permitted in a magazine of general and unrestricted distribution." The grand jury said that the publication of the birth photographs, while not in good taste, was not a violation of the law. Meanwhile, in Mount Holly, New Jersey, Howard Eastwood, Burlington County Prosecutor, ordered police to seize copies of the magazine. Eastwood said that from a verbal description of the photographs, he felt that they were illegal. At about the same time the State Department of the Catholic War Veterans adopted a resolution asking all district attorneys to suppress the magazine, calling it "an insult to decency, morality, and motherhood."[46]

Underlying this movement against Life in the New York area was the strong role played by Foley. In sharing his views on the conflict after its conclusion, Foley defended his actions. In a speech before the Holy Name Society of the New York Fire Department in Manhattan, the Bronx, and Richmond, Foley said:

> I try to live as a Catholic and administer my job as a Catholic.
>
> In these changing times, people are impatient with adherance to standards of decency decreed by Catholic traditions. The people who are impatient with us today are the people who have lost their sense of perspective. Those are the people who swing the pendulum all the way across and bow to the ideology of the day--of sneering at God.[47]

Life Goes To Trial

Given the fact that Roy Larsen had seen his magazine being banned in cities across the country, and having been challenged openly by Foley to carry the issue into court, it comes as little surprise that the publisher picked up the gauntlet and agreed to submit himself to arrest for selling an obscene publication.

Prior to announcing his decision to submit himself to arrest, Larsen said that his magazine would defend any news dealer arrested in the Bronx for selling the publication. Harold Medina, an attorney for Life, conferred with Foley and said that he (Medina) would press for an early hearing for anyone arrested for selling the magazine. Meanwhile, Life officials reported that the sale of the magazine in areas not covered by Foley's ban were moving at a brisk pace.[48] The ban on the magazine in parts of New York reportedly led to a rash of sales in other parts of the city, with supplies of the magazine exhausted, and available copies selling at premium rates. Even the main office of Life found itself deficient and had to retrieve several issues sent out to its attorney. No additional copies were published to meet this shortage.[49]

Although Larsen had originally planned to submit himself for arrest on April 9, this move was delayed for two days until April 11 by mutual consent between the attorneys for Larsen and Foley. Larsen's attorney, Morris L. Ernst, expressed confidence before going to trial. He said, "We haven't any doubt we'll win the case. The arrests were silly and stupid. Why if those pictures were obscene, some 800 books in general circulation, many of which can be secured by anyone at any public library, are obscene."[50]

Flanked by three attorneys, Larsen was finally arrested after he had made arrangements with Foley to sell a copy of Life to Detective Frank McCarthy. Larsen's reason for submitting himself for arrest was, according to Foley, to test the ban rather than continue to have newsdealers arrested for selling the magazine. Larsen said that the magazine had been sold out and that not more than 10,000 of the 2,000,000 copies printed were confiscated.[51] Following his arrest on April 12, Larsen pleaded not guilty and was released in his lawyer's custody. His cases was adjourned until April 19.[52]

Larsen's defense team won an important point early in the trial. The prosecution was overruled on a move to prevent Larsen's attorneys from calling expert witnesses to testify about the photographs. Using twenty-one experts in medicine, education, religion, and social welfare, Larsen's attorney, Morris Ernst, was able to demonstrate that the photographs were valuable, decent, constructive, and dignified. These experts said that the photographs would help allay fears of expectant mothers and help eliminate ignorance on the subject.[53]

On April 26, the three judge court handed down a unanimous decision clearing Larsen of all charges of selling an obscene publication. In the decision of People v. Larsen, written by Justice Perlman, the court said,

> . . . .the picture story, because of the manner in which it was presented, does not fall within the forbidden class. The picture story was directly based on a film produced under the auspices of a responsible medical group. There is no nudity or unncecessary disclosure. The subject has been treated with delicacy.[54]

When learning of the decision, Ernst said, "This means that there will be no more of this nonsense in the country where petty police chiefs set themselves up as censors of the nation's reading."[55]

The Impact of People v. Larsen

Although Ernst felt that the results of Larsen would eventually limit the action of other police officials trying to censor publications, the actual legal impact of the case was somewhat limited. Even though the case was never appealed, which would have a tendency to increase the chances of it serving as a guide for future litigation, Larsen was cited on six different occasions by courts ruling on a question of obscenity. Five of the sex cases citing Larsen came from the New England area, while the sixth case was a court decision in the midwest.

The most common use of Larsen was to draw upon the definition for obscenity used by Justice Perlman. In Larsen obscene material was defined as that which tended "to corrupt morals or to lower the standards of right or wrong concerning sexual behavior."[56] This definition was later used by the City Magistrate's Court in New York in two obscenity cases involving the same defendant.[57] The Larsen definition of obscenity was also used in another case decided in a Court of Special Sessions in New York City.[58] The fourth court to rely on the definition of obscenity provided by Larsen was also in the same general part of the country. Fifteen years after Larsen, the Superior Court of New Jersey called upon the definition of obscenity used in Larsen.[59]

The legal impact of Larsen was not limited to just a definition of obscenity. Two other concepts concerning ways an item could be judged as being obscene that were put forth in Larsen later found their way into two other court decisions. In one instance, the Superior Court of Delaware cited Larsen's use of expert testimony to help determine if an item would have a harmful effect on an individual as justification for allowing the use of expert testimony in the case at hand.[60] And in a United States Court of Appeals, Seventh Circuit, decision, Larsen was cited as support for the concept that the only real way to determine if the material under question was obscene would be to examine thoroughly the facts of the case.[61]

Even though Larsen's legal impact was not overwhelming in its jurisdictions dealing with obscenity cases, it is interesting to note that this trial court decision did manage to find its way into six later obscenity cases. A similar comment can be made about this entire episode's impact on editorial commentary that focused on the question of censorship. For example, Editor and Publisher carried an editorial on Life's battle with the censors shortly after the event began. The commentary said, in part:

> Its [Life's] publication does illustrate, however, how far the frontiers of taboo have been moved since Anthony Comstock successfully prosecuted art and literary productions that might offend today's readers only by the intangibility of their allusions to the forbidden.
>
> Genuine censorship, not by publicity-hungry cops, clergymen or prosecutors, awaits the picture publishers if the dirty-minded segment attempts to exploit Life's enterprise by invading fields which the great middle class, buyers of magazines, will not tolerate in the printed page on the library

tables.[62]

Other writers have seen Life's battle with the censors as a fight for liberty.[63] or a victory "won by the forces of cultural freedom."[64] And one man who played a key role in this episode, Morris Ernst, wrote several years later that the lack of a defense offered by many publishers of books and magazines accused of being obscene can lead and has led to censorship. Ernst wrote:

> Such timidity naturally encourages the censorious. More important, it helps produce unconsidered law on censorship. A street-corner newsstand owner does not make enough profit on the sale of any magazine to warrant the expense of a court defense. It is cheaper to plead guilty . . . .
>
> No wonder vice hunters and police usually level their guns, not at the wealthier publisher who selects the manuscript (and who is really responsible for its publication) but at relatively impecunious retailers who order a few copies, often as samples, and usually on consignment.[65]

In Conclusion

Just as Ernst is able to draw upon his experience in the "Birth of a Baby" episode to conclude that timid defense leads to more censorship, so too can others draw upon this same event to find other thoughts for the future.

The first observation is that when a small, yet highly motivated and vocal minority takes as its cause the suppression of something that violates their standards of morality and decency, they sometimes can have swift and successful results. This is especially true when members of this minority hold positions of local power. Obviously the actions of this moral minority in the 1930's bear some rather striking similarities to a so-called "moral majority" operating in today's society. We are often faced with the same tactics of a small, highly organized and vocal minority who, claiming that the general public holds the same standards of morality as they, move against literature that has been considered informative and educational, not obscene. The issues facing us today on the banning of books and magazines from public and school libraries are fundamentally the same as those issues surrounding the attempt to censor Life in 1938.

The second general observation for future consideration that can be drawn from this move against Life in the 1930's is that censorship does not work. In the case of Life's birth photographs, only a small number of copies of the magazine were actually kept from the general public. If anything, the publicity generated by the attempt to keep the magazine off the newsstands led to an even wider circulation of the magazine. The same is true today. Try to ban a publication or limit its circulation, and you almost certainly make it a best seller.

If only one comment could put into proper perspective the attempt to censor Life in 1938, that comment was made by then First Lady Eleanor Roosevelt in her weekly news conference. The First Lady spoke of her friend's five year old son who was shown the four page photo feature depicting the birth of a baby. With a look of complete boredom, he said, "The ostrich in school had a much harder time laying an egg."[66]

Endnotes

[1]Sheryle Leekley and John Leekley, Moments: The Putlizer Prize Photographs (New York: Crown Publishers, 1978), pp. 90-3.

[2]Morris L. Ernst and Alexander Lindey, The Censor Marches On (New York: Doubleday, Doran, 1940, 1940), p. 53.

[3]"Facts of Life," Time, 18 April 1938, p. 57.

[4]William Manchester, The Glory and the Dream a Narrative History America, 1932-1972 (Boston: Little, Brown, 1973), p. 118.

[5]Ibid., p. 120.

[6]"Facts of Life," p. 57.

[7]"The Birth of a Baby," Time, 4 April 1938, p. 30.

[8]Ernst and Lindey, Censor, p. 98.

[9]Ibid., pp. 52-3.

[10]"Facts of Life," p. 58.

[11]"Life Begins," Editor and Publisher, 9 April 1938, p. 20.

[12]"Facts of Life (cont'd.)," Time, 25 April 1938, p. 34.

[13]Ernst and Lindey, Censor, p. 53.

[14]"Obscene Magazine Ban to be Asked," Christian Science Monitor, 4 April 1938, p. 9.

[15]"107 Will Help Police as Censors," Christian Science Monitor, 5 April 1938, p. 9.

[16]"Censorship Plan Brings Results," Christian Science Minitor, 7 April 1938, p. 9. There was no specific reference to the name of the magazine, although later articles did point out that the periodical under question was the April 11 issue of Life. It should be noted that the magazine censorship board submitted the issue to Timilty for his ruling. This leads to the question of whether there was some dispute among the newsdealers as to the "obscenity" of the photo essay, thus requiring them to submit the issue to Timilty for a final ruling, according to the plan agreed to several days before.

[17]"Picture Magazines With Pages Deleted Sold by Newsstands," Christian Science Monitor, 9 April 1938, p. 9.

[18]"Pittsfield, Mass," Memphis Commercial Appeal, 7 April 1938, p. 1.

[19]"Life Ban Spreads to Pennsylvania, " New York Times, 10 April 1938, p. 21.

[20]Paul Blanshard, The Right to Read: The Battle Against Censorship (Boston: The Beacon Press, 1955), p. 156.

[21]"Boston Bans Another," New York Times, 11 April 1938, p. 6.

[22]"Ten Cities Ban Life's Birth Issue," New York Times, 8 April 1938, p. 6.

[23]"Wide Ban on 'Life' for Birth Pictures," New York Times, 9 April 1938, p. 15.

[24]"Hue and Cry Goes Up In Conservative Boston," Memphis Commercial Appeal, 8 April 1938, p. 2.

[25]"Timilty to Ask Magazine's Ban," Christian Science Monitor, 9 April 1938, p. 11.

[26]Ibid., p. 9.

[27]"St. Louis Police Take 'Life' Off Newsstands," St. Louis Post-Dispatch, 9 April 1938. For a similar account of these events, see "Seize Magazine Declared Lewd," St. Louis Globe-Democrat, 9 April 1938, p. 1. In this particular article, it was mentioned that Rogan was to appear before Judge Simpson's Court of Criminal Correction on April 14. However, no mention of this appearance, nor any mention of a dismissal of charges was contained in either of the St. Louis newspapers for several days surrounding this date. Also, a search for a reported case dealing with Rogan produced nothing. One can speculate that the charges were eventually dropped, and thus nothing was noted either officially or in the area newspapers.

[28]"Furor Over a Magazine's Pictures," St. Louis Post-Dispatch, 9 April 1938, p. 4.

[29]"Civil Liberties Committee Objects to 'Life,'" St. Louis Post-Dispatch, 11 April 1938, p. 4.

[30]"Life Ban Spreads to Pennsylvania," p. 21.

[31]"Committee Protests Magazine Seizure," St. Louis Globe-Democrat, 12 April 1938, p. 8.

[32]"All But 50 Copies of Seized Magazine Returned to Agent" St. Louis Post-Dispatch, 12 April 1938, p. 3.

[33]"City Officials Ban Magazine's Camera Study of Childbirth," Memphis Commercial Appeal, 8 April 1938, p. 1.

[34]Ibid.

[35]"Furor Condones, Condemns City's Ban on Life Magazine" Memphis Commercial Appeal, 9 April 1938, p. 1.

[36]Ibid., p. 3.

[37]Ibid., p. 1.

[38]"Ban Magazine With Pictures of Childbirth," Chicago Daily Tribune, 9 April 1938, p. 16.

[39]"Allman Lifts Temporary Ban on Sale of Magazine," Chicago Daily Tribune, 10 April 1938, p. 18.

[40]"Expert Publicity," New Orleans Times-Picayune, 9 April 1938, p. 8. The only mention of the ban in New Orleans encountered in this study came from news sources outside of the city. See, e.g., Memphis Commercial Appeal, 8 April 1938, p. 1; and Time, 18 April 1938, p. 58.

[41]"Life Ban Spreads to Pennsylvania" p. 21.

[42]"Facts of Life," p. 57;

[43]Furor Condones, Condemns City's Ban on Life Magazine," p. 1.

[44]"Wide Ban on 'Life' for Birth Pictures," New York Times, 9 April 1938, p. 15.

[45]Ibid.

[46]"Publisher of 'Life' Arested in Test," New York Times, 13 April 1938, p. 46.

[47]"Foley Condemns 'Sneering at God,'" New York Times, 25 April 1938, p. 9.

[48]"Wide Ban on 'Life' for Birth Pictures," p. 15.

[49]"Life Ban Spreads to Pennsylvania," p. 21.

[50]Ibid.

[51]"Publisher of Life Pushes Court Test," New York Times, 12 April 1938, p. 6.

[52]"Publisher of 'Life' Arrested in Test," p. 46

[53]"Larsen Wins Point in Indecency Trial," New York Times, 20 April 1938, p. 46.

[54]5 N.Y.S.2d 55, 57 (N.Y. Sp. Sess. 1938).

[55]"Court Clears 'Life' on Baby Pictures," New York Times, 27 April 1938, p. 3.

[56]5 N.Y.S.2d at 56.

[57]People v. Finkelstein, 114 N.Y.S.2d 810, 813 (N.Y. Magis. Ct., 1952); People v. Finkelstein, 156 N.Y.S.2d 104, 109 (N.Y. Magis. Ct. 1955).

[58]People v. Mishkin, 207 N.Y.S.2d 390, 394 (N.Y. Sp. Sess. 1960).

[59]Bantam Books v. Melko 96 A.2d 47, 59 (N.J. Super. Ct. Ch. Div. 1953).

[60]State v. Scope, 86 A.2d 154, 157 (Del. Super. Ct. 1952).

[61]Capitol Enterprises, Inc. v. City of Chicago, 260 F2d 670, 675 (7th Cir. 1958).

[62]"A Lively Issue," Editor & Publisher, 16 April 1938, p. 20.

[63]Blanshard, The Right to Read, p. 156.

[64]Olga G. Hoyt and Edwin P. Hoyt, Censorship in America (New York: The Seabury Press, 1970), p. 42.

[65]Morris L. Ernst and Alan U. Schwartz, Censorship: The Search for the Obscene (New York: The Macmillan Co., 1964), pp. 114-5.

[66]"Mrs. Roosevelt Approves 'Birth of a Baby' Pictures," St. Louis Post-Dispatch, 18 April 1938, p. 9.

CONCEPTUALIZATION OF A MEASURE OF PATRIOTISM

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The flag of any nation is more than a design of colored cloth. The flag is a symbol whose dimensions range from a simple sign of recognition to a representation of a complex system of values which, in whole or in part, are adhered to by those people who live under the banner.[1] In one sense, the public adherence to the values symbolized by the flag could be conveniently labeled as patriotism. "Waving or displaying the flag on appropriate occasions," as Lindmark points out, "has been equated with total patriotism or the only real patriotism."[2] Yet patriotism has its own dimensions, which may or may not be associated with the symbol of the flag.

In homogeneous or totalitarian societies the dimensions of patriotism and respect for the flag are very nearly equivalent. In such societies, to negate the symbol of the flag is to disavow the values of the society. To disavow even some of the values of the society is to dishonor the symbol and to be somehow less patriotic. The history of virtually all nations is marked by episodes in which the flag and patriotism are inextricably linked. "The fear of an enemy from within is a permanent concern of totalitarian regimes," according to Johoda and Cook.[3] Nazi Germany, World War II Japan, and even the United States during the period of "manifest destiny" are all representative of times which at best could be called nationalistic and at worst were xenophobic but in all cases were super-patriotic.

Nations, however, do not always maintain nationalistic fervor and super patriotism characterized by unreasoning love for the national symbol. Cultural pluralism, tolerance, and the exercise of free speech work to loosen the connection between love of country and the love of flag.[4] Flags, however, still remain as national symbols and patriotic values are still honored in even the most pluralistic and tolerant of societies. Thus, any assessment of the patriotic impulse ought to contain some measure of attitudes about the national symbol. This paper presents the development of an instrument to assess patriotism in the United States.

A Conceptualization of Patriotism

Patriotism, as noted earlier, is a complex system of individual and collective ideals and behaviors. In the United States, many of the ideals are expressed in the Constitution. Foremost among these ideals are the free exercise of speech, the right to assemble, the freedom of the press, and freedom of religion. For purposes of this investigation patriotism will be thus partially defined as a belief in, and agreement with these principles. Yet, not all patriotic ideals are so clearly or forcefully expressed. There are behaviors and beliefs which are deemed "patriotic" in practice but appear nowhere in the legal underpinnings of the society. Examples of these types of beliefs and practices are the singing of patriotic songs or pledging allegiance to the flag. The latter example points up the fact that many of the "unwritten rules" of patriotic behavior are embodied in the treatment of the national emblem. This is not surprising for as Goodman and Gorden noted; "to praise a flag is in one respect akin to urging a course of action."[5] The action referred to, of course, is the overt practice of both the written and unwritten rules of patriotic conduct.

Emerging from this conceptualization is a threefold definition of

patriotism (1) attitudes about belief in constitutional ideals, (2) attitudes about the practice of patriotic ritual, and (3) attitudes about the national symbol. Using these three components, a twenty-five item instrument was developed.

Scale Development

Focus upon measuring attitudes regarding patriotic ritual and ceremony, and toward significant symbols of patriotism such as the flag, follows a line of free speech research.[6] Barbour views attitudes as a "syndrome of response consistency in reference to an attitude object"; and he explains signs that attitudes exist are seen in the way "respondents to an attitude object (usually topical and in the public domain) tend to organize themselves."[7] Attitudes, thus, may be thought of as mediating and intervening variables.[8] Knowledge about attitudes is sociologically significant because it tells us about groups of people.

Studies regarding American attitudes toward political loyalties abound since the times of the Lynds' landmark study of Middletown in the 20s, Adorno's, and Remmer's and others' attention to Facism in the 40s, Stoffer's work on Communism in the 50s and and 60s,[9] and of course Gallup type polls. Yet, none of these studies has zeroed in on the "patriotic experience."

Arnold developed two scales to measure belief in constitutional ideals and attitudes toward flag use.[10] The constitutional items dealt specifically with First Amendment rights and consisted of modified quotations from the Constitution requiring a response along a five point "strongly agree" to "strongly disagree" scale. Several of these items were included in the present instrument.

The flag use items also employed a five point response scale. These items dealt with flag desecration and defacement, the flying of anarchistic banners, and the belief that the flag should, if necessary, be fought and died for. In addition to the four flag use items constructed by Arnold, two more items; "Flag desecrators aid the enemy" and "Placing the flag on a commercial product degrades the flag" were added for the present instrument. The remaining items dealt with patriotic practice and less specific patriotic beliefs such as "Overall this country has been good to me and my family" and "Patriotic tradition should be encouraged." The patriotic ritual items also employed the five point response scale. The original instrument contained twenty-five items and is displayed in Table 1.

The twenty-five items scale was administered to 248 subjects ranging in age from under 15 to over 51. More than half the sample was above 30 years of age. In addition the sample included veterans, relatives of veterans, people from rural, suburban, and urban backgrounds and an almost equal proportion of men and women. Reliability analysis was conducted on the three dimensions separately and those items which failed to correlate with the total subscale score at $r = .45$ or better were dropped from further consideration. This left four items in the flag use subscale, three items in the constitutional subscale and nine items in the patriotic ritual subscale. Principal component factor analysis was followed by varimax rotation to seek the simplest structure. For an item to be considered loaded it had to load at at least .45 on a factor. An oblique rotation was also conducted to assess factor independence. The results of these analyses produced a three factor solution with a correlation of .38 between factors I and II. The items and factor loadings are displayed in Table 2.

Two items, "The communist threat to this country is real" and "Without exception school children should regularly salute the flag" failed to load where expected. Both were thought to be related to patriotic ritual and belief but loaded on the flag use factor. Given the nature of the item to subscale correlations for these items, however, they were maintained in the instrument as a whole.

Table 1

Items and Subscales

FLAG USE

The flag of our country should be fought and if necessary died for.

Anyone carrying or displaying a red or black flag or banner or displaying a flag of any anarchistic society should be arrested.

Anyone burning or desecrating the American flag should be imprisoned or fined.

Students shouldn't be punished if they deface the American flag.

Flag desecrators aid the enemy.

Placing a flag on a commercial product degrades the flag.

CONSTITUTIONAL

The Federal Government should make no law abridging freedom of expression.

Anyone who tries to persuade others to radically change our government should be prevented from doing so in speech or press.

The Federal Government should make no law abridging freedom of speech or press.

The Federal Government should make no law abridging the freedom of expression (defined as a symbolic act) of its citizens.

No law should prohibit the free exercise of religion.

The Federal Government should make no law bridging the right of the people to peaceably assemble.

PATRIOTIC RITUAL AND BELIEF

In my parent's residence, it is a custom to display the flag on patriotic holidays.

In my present residence, it is my custom to display the flag on patriotic holidays.

In the community where I grew up, patriotism was important.

In my present community, patriotism is important.

Overall this country has been good to me and my family.

I like to join in the singing of patriotic songs.

If asked, I could lead others in pledging allegiance to the flag.

Patriotic traditions should be encouraged.

The Communist threat in this country is real.

Patriotic traditions promote unthinking citizenship.

I am concientiously opposed to military service.

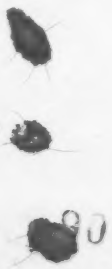
Our patriotic customs also should include ceremonies to celebrate the the United Nations.

Without exception, school children should regularly salute the flag.

Table 2

Factor Loadings: Oblique Rotation

Subscale and Factor	Factor Loading
FLAG USE: FACTOR 1	
The flag of our country should be fought and if necessary died for.	.70
Anyone carrying or displaying a red or black flag or banner or displaying a flag of any anarchistic society should be arrested.	.59
Anyone burning or desecrating the American flag should be imprisoned or fined.	.70
The Communist threat to this country is real.	.76
Flag desecrators aid the enemy.	.81
Without exception, school children should regularly salute the flag.	.72
CONSTITUTIONAL: FACTOR 3	
The Federal Government should make no law abridging the freedom of speech or press.	.78
The Federal Government should make no law abridging the the freedom of expression (defined as a symbolic act) of of its citizens.	.66
The Federal Government should make no law abridging the right of the people to peaceably assemble.	.66
PATRIOTIC RITUAL AND BELIEF: FACTOR 2	
In my parent's residence, it is a custom to display the flag on patriotic holidays.	.81
In my present residence, it is my custom to display the flag on patriotic holidays.	.77
In the community where I grew up patriotism was important.	.75
In my present community, patriotism is important.	.68
I like to join in the singing of patriotic songs.	.45
If asked, I could lead others in pledging allegiance to the flag.	.56
Patriotic traditions should be encouraged.	.49



Reliability and Validity

Using the factors generated by the oblique rotation, the internal reliability of the subscales was assessed by calculating Chronbach's Alpha for each of the subscales. The standardized alpha for the Flag Use subscale was .83. For the Patriotic Ritual and Belief subscale, alpha was .83, and for the Constitutional items, the standardized alpha was .61. What this analysis appears to indicate, particularly in light of the moderate association between the Flag Use factor and the Patriotic Ritual and Belief factor is that there is good internal reliability and some evidence for the validity of the two scales considered separately. The Constitutional items do not associate with each other very strongly nor with the other subscales when taken as a group.

To test the construct validity of the instrument four separate homogeneous groups were studied: (1) American Legion and VFW veterans organizations (2) first or second generation American members of the same ethnic group, (3) a young fundamentalist Mennonite Bible study class and (4) a group of Quakers. Given common beliefs about the patriotic attitudes of those separate groups it was expected that the veterans would score highest while the Quakers, with their well known pacificism, would score lowest.

The results upheld the predictions. On a range of -32 through 0 to +32, the veterans scored 22.63 (N = 30), the ethnic group scored 13.88 (N = 9), the Bible study group scored 3.2 (N = 13) and the Quakers scored -2.16 (N = 7). The score for the 248 member heterogeneous group was 10.06. These results seem to provide sufficient evidence of construct validity for the patriotism scale.

Discussion

On the one hand, the reliability and construct validity of the Flag Use and Patriotic Ritual and Belief subscales show promise as valuable measures of the patriotic impulse. The relatively poor showing of the Constitutional items, on the other hand presents a problem. At worst, the conceptual definition of patriotism presented earlier could be called into question. At best, the wording of the Constitutional items may have created some of the problem as they were somewhat out of character with the other items. Clearly, considerations of constitutional questions represent a distinct dimension of patriotism. What remains, then for future research is the task of creating more specific and reliable items for assessing this dimension.

Our research discovered that greater traditional patriotic sentiment was associated with a perception of an attention to patriotic ceremony. One would reason that traditional celebration of patriotism would result in traditional patriotic attitudes. Further research regarding patriotic attitudes might focus upon the assimilation of cultural norms in a society which idealizes free speech and individualism.

The deep loyalty of super patriots is beautiful in its intensity and simplicity and yet is naive and restrictive. Gordon in The Language of Communication explains that through symbols we find "a type of conviction or thought or feeling which would otherwise be impossible to generate."[11] If those with less polarized attitudes do not enjoy the same enthusiasm of patriotic ritual and ceremony, that too merits investigation.

Those who have measured Americans' attitudes toward the First Amendment have uncovered ample data for pessimism and have noted the tendency to "fair weather friendships" of free speech and press.[12] Is it possible those persons who consider it their patriotic duty to silence opposition in the name of national security might be persuaded to appreciate the worthy roles played by divergent voices and loyal opposition? More research regarding the nature of patriotism may better insure that the democratic experiment will survive and thrive.

Endnotes

[1]Joyce Lindmark, "The Flag As A Non-verbal Symbol," Free Speech Yearbook 1971 (New York: Speech Communication Association, 1971), pp. 64-69.

[2]Lindmark, p. 65

[3]Marie Johoda and Stuart W. Cook, Totalitarianism (Cambridge, Mass.: Harvard University Press, 1954). For the larger socio-psychological explanation of what causes a society to embrace repressive measures see pp. 203-230.

[4]John Lee Jellicorse and Robert D. Harrison, "The Historical Dimension of Free Speech: Suggested Readings," Free Speech Yearbook 1973 (New York: Speech Communication Association, 1974), pp. 60-65. Also see Elden Rosenthal, "Symbolic Speech: A Constitutional Orphan," Free Speech Yearbook 1971 (New York: Speech Communication Association, 1971), pp. 69-76.

[5]Richard J. Goodman and William I. Gorden, "The Rhetoric of Desecration," Quarterly Journal of Speech 52 (February, 1971), pp. 23-31.

[6]Alton Barbour and Alvin Goldberg, "Survey Research in Free Speech Attitudes," Free Speech Yearbook 1971 (New York: Speech Communication Association, 1971), pp. 28-35; Alton Barbour, "Some Psychological Dimensions of Free Speech Attitudes," Free Speech Yearbook 1978 (Falls Church, VA.: Speech Communication Association, 1978), pp. 68-72. The free speech attitude studies accomplished over the past several decades at the University of Denver have far surpassed all other empirical scholarship along these lines in the speech communication field.

[7]Barbour, p. 70.

[8]Barbour, p. 70.

[9]Robert S. Lynd and Helen Merrell Lynd, Middletown: A Study of American Culture (New York: Harcourt, Brace, Jovanovich, 1929); T. W. Adorno, et al, The Authoritarian Personality (New York: Harper, 1950); H.H. Remmers, Anti-Democratic Attitudes in American Schools (Evanston, Ill.: Northwestern University Press, 1963); Samuel A. Stouffer, Communism, Conformity and Civil Liberties: A Cross Section of the Nation Speaks Its Mind (New York: Doubleday, 1963).

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[11]George N. Gordon, The Language of Communication (New York: Hastings House, 1969), pp. 63-64.

[12]Franklyn Haiman, "A Revised Scale for the Measurement of Openmindedness," Speech Monographs, 31 (1964), pp. 97-102; Barbour's report on the University of Denver studies; William I. Gorden and Dominic A. Infante, "Attitudes Toward Free Speech: Trends, Measurement and Individual Difference Considerations," Free Speech Yearbook 1980 (Annandale, VA.: Speech Communication Association, 1981), pp. 115-125; and Berkeley Rice, "Fair-Weather Friends of Free Speech?" Psychology Today, 15 (April 1981), p. 100.

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